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IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885.

NO. 228.

THE WABASH, ST. LOUIS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendants in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF AND ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

H. S. GREENE, FOR PLAINTIFF IN ERROR.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1886.

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STATEMENT OF CASE.

On the 22d day of March, 1882, the People of the State of Illinois, by the Attorney General of that State, commenced in the Circuit Court of Ford County, an action against the Plaintiff

in error. The action was in the common law form of debt, and claimed a debt of $25,000, and a like sum as damages.

The declaration contained several counts, one being for the recovery of a statutory penalty for alleged extortion in rates charged for transporting freight. That particular count was afterwards dismissed by defendants in error.

Under subsequent proceedings, all the remaining counts of the declaration, except the first, ceased to be of importance, and need not be further noticed, as no question arises as to pleadings, and no evidence whatever was offered, except under the first count.

The first count avers in substance that the defendant (now plaintiff in error), on the 29th day of August, 1881, was a railroad corporation, owning and operating a railroad lying partly within the State of Illinois, and running eastward from Peoria in said State, through the stations of Gilman and Sheldon, Illinois, to Toledo, in the State of Ohio, and was a common carrier of freight and passengers on said road.

That said defendant on said day, transported for the firm of Elder & McKinney, eastward over said road and over other railroads connected with defendant's road, from Peoria, Illinois, a station on said road, through said Gilman to New York City, in the State of New York, one car load of corn of the weight of twenty-six thousand pounds, and charged, collected and received from said Elder & McKinney for the defendants' entire toll and compensation for the said carriage and transportation of said car load of corn, over said railroad and connecting lines, from said Peoria to New York City, the sum of thirty-nine dollars.

That afterwards, on said day and year, said defendant transported for the firm of Bailey & Swannell, eastward over said

road, owned and operated by the defendant, and over said other lines of railroad connected therewith, from Gilman, in the State of Illinois, to New York City, in the State of New York, a certain car load of oil cake of the weight of twenty-six thousand pounds, and charged, collected and received from said Bailey & Swannell, for the said transportation of oil cake on said railroad and connecting lines, from Gilman aforesaid to New York City aforesaid, the sum of sixty-five dollars, which said sum Bailey & Swannell paid under protest.

The first count further avers that the oil cake last aforesaid was of the same quantity and of the same class of freight as the car load of corn aforesaid, and was transported in the same direction and over the same lines of railroad. That the distance over and upon which the said corn was transported from Peoria eastward to Sheldon, a station on the line of said railroad, on the eastern boundary of the State of Illinois, is one hundred and nine miles, and the distance from Gilman on said road over which said oil cake was transported to Sheldon Station is only twenty-three miles; and that the distance from Gilman to New York City is less than the distance from Peoria to New York City by eighty-six miles. That the rate of freight so charged by the defendant for the transportation of said corn from Peoria to New York City aforesaid was only 15 cents per 100 pounds per car load, making twenty-nine dollars; and the rate charged by defendant for transporting said oil cake from Gilman aforesaid to New York aforesaid, a less distance, was 25 cents per 100 pounds, making sixty-five dollars.

That the defendant made, demanded and received the same proportionate discrimination in the said rates of freight for the transportation of said oil cake and corn over its line of railroad in the State of Illinois, that was made and received as aforesaid

for said transportation between Peoria and New York City and said Gilman and New York City.

By means whereof the defendant was guilty of making unjust discrimination in the rates charged and received for transporting said one car load of corn and one car load of oil cake, to the great injury of the citizens of the State of Illinois, and contrary to the form of the statute in such cases made and provided; whereby an action accrued to the plaintiffs to have and demand from the defendant the sum of five thousand dollars.

(Pages 3, 4 and 5 of printed Record.)

On the 3d day of April, 1882, the plaintiff in error filed in the Circuit Court of Ford county, Illinois, its demurrer to each count of the declaration, and also filed its petition for a removal of the said cause to the Circuit Court of the United States for the Southern District of Illinois, and also presented its bond as required by the act of Congress. On the 8th day of April, 1882, the Circuit Court denied the motion for the removal of said cause and also sustained the demurrer, filed by the plaintiff in error, to each count of the declaration. The defendant in error then entered a *nolle* to the fifth count of the declaration, being the count in which extortion was charged as before stated. Defendant in error stood by its demurrer to the other counts of the declaration, and the Court having given judgment in favor of the defendant (below), an appeal was allowed defendant in error to the Supreme Court of the State from said judgment.

(Printed Record, p. 24.)

As the Supreme Court of the State afterwards decided that the action of the lower Court in denying the application of plaintiff in error for a removal of the cause to the United States Court, was not properly before it for consideration, and struck out so

much of the bill of exceptions as related to such application and the action of the Court thereon, we do not assign such action as error, and therefore will not further refer thereto.

At the December term, A. D. 1882, of the Ford County Circuit Court further proceedings were had in the cause. A mandate and judgment of the Supreme Court of the State was filed, reversing the former judgment of the Circuit Court. Thereupon the cause was re-docketed, the demurrer of plaintiff in error to the first four counts of the declaration (formerly sustained) was overruled, and the plaintiff in error pleaded instanter.

(Printed Record, pp. 25 and 26.)

The plaintiff in error filed its plea of *nil debet*, and also a special plea. The first plea put the defendant in error upon proof of the whole case. But as a precautionary measure the special plea set up the following, in substance:

That the rates of toll or compensation charged by the defendant and specified in the declaration, and for charging which said action was brought, were so charged for services rendered under entire agreements to transport from Gilman, in the State of Illinois, to New York City, in the State of New York, and that in said undertakings and agreements the portions of such services rendered or to be rendered within the State of Illinois, were not apportioned or separated from said entire service. That the said action was founded solely on a certain act of the General Assembly of the State of Illinois, (specially referred to in the plea, the provisions of which are now in question and will be set forth hereafter).

That said services having been rendered under entire agreements to transport said freight from within the State of Illinois

to the State of New York aforesaid, the said act of the General Assembly of Illinois did not affect or control, or relate to the same, but on the contrary such transportation being among the States, falls within the operation of, and is wholly controlled by, the terms of the 3d clause of Section 8, of Article 1, of the Constitution of the United States, and that defendant relied upon said clause, as a complete defense and protection in said action.

(Printed Record, p. 14.)

The plaintiffs (below) joined issue on the plea of *nil debet* or the general issue, and demurred to the special plea.

The Court sustained said demurrer, and the defendant stood by the same.

(Record, p. 26.)

The cause then proceeded to trial on the issue presented by the plea of *nil debet.*

The parties by agreement waived a jury, and submitted the issues to the court for trial. The only evidence on which the trial was had was contained in a certain stipulation which is as follows:

"For the purposes of the trial of said cause, and to save the making of proof therein, it is hereby agreed on the part of the defendant that the allegations in the first count of the declaration are true, except that part of said count which avers that the same proportionate discrimination was made in the transportation of said property—oil cake and corn, that was made between Peoria and the City of New York, and Gilman and New York City, which averment is not admitted because defendant claims that it is an inference from the fact that the rates charged in each case of said transportation of oil cake and corn were through rates, but it is admitted that said averment is a proper one."

This was all the evidence offered.

(We may state here that the purpose of the qualification found in the above stipulation was this; the plaintiff in error would not admit that the parties by and for whom said transportation service was performed, made any apportionment of said service by agreement or otherwise, with reference to State lines, but was willing to admit that the averment referred to was a proper one to test the question whether the law would make such apportionment, not made by the parties.)

(Printed Record, p. 16.)

The 42d section of chapter 110 of the statutes of Illinois, known as the Practice Act, provides that "in all cases in any court of "record of this State, if the parties shall agree, both matters of "law and fact may be tried by the Court and on such trial either "party may, within such time as the court may require, submit "to the court written propositions to be held as law in the decision "of the case, upon which the court shall write "refused" or "held" "as he shall be of opinion is the law, or modify the same, to "which either party may except as to other opinions of the Co.urt"

Hurd's Statutes, edition of 1883, p. 837.

Under the above provisions the plaintiff in error presented in writing to the Court on the trial of said cause the following propositions, and prayed the Court to mark each proposition "held":

"The Court holds as law, that as the tolls or rates of compensa-"tion charged and collected by the defendant in the instance in "question, were for transportation service rendered in transporting "freight from a point in the State of Illinois to a point in the "State of New York, under an entire contract or undertaking to "transport such freight the whole distance between such points; "that the act of the General Assembly of Illinois, approved May "2d, 1873, entitled 'an act to prevent extortion and unjust dis-"crimination in the rates charged for the transportation of pas-"sengers and freight on the railroads in this State, and to punish "the same, and to prescribe a mode of procedure and rules of "evidence in relation thereto, and to repeal an act to prevent

"unjust discrimination and extortion in the rates to be charged by "the different railroads in this State for the transportation on "said roads,' approved April 7, 1871, does not apply to or control "such charges, nor can the defendant be held liable in this action "for the penalties prescribed in this act.

"The Court further holds as law, that said act in relation to ex- "tortion and unjust discrimination cannot apply to transportation "service rendered partly without this State, and consisting of the "transportation of freight from within the State of Illinois to the "State of New York, and said act cannot operate beyond the "limits of the State of Illinois.

"The Court further holds as matter of law, that the transporta- "tion in question falls within the proper description of 'Commerce "among the States,' and as such can only be regulated by the "Congress of the United States under the terms of the third "clause of Section 8, of Article 1, of the Constitution of the "United States.

"That the penalties sued for in this action could only be imposed "under proper statutory authority, and such authority not being "found, the law is for the defendant."

(Printed Record, p. 27.)

The Court refused the prayer of the defendant, and marked each of said written propositions "refused," to which action of the Court the defendant then and there excepted.

(Printed Record, p. 17.)

After argument of counsel, the Court found the issues for the plaintiff, and rendered judgment against the defendant for the sum of one thousand dollars and costs.

The defendant moved for a new trial, which was overruled by the Court, and defendant excepted. Defendant also prayed an appeal to the Supreme Court of Illinois, which was allowed on conditions, and was perfected.

(Printed Record, pages 26 and 27.)

When the cause was taken to the Supreme Court of the State, the plaintiff in error assigned among other errors, the following:

"The Court erred in overruling the demurrer of said plaintiff in "error to each of the first four counts of the plaintiff's declar- "ation.

"In sustaining the demurrer to the special plea of the plaintiff "in error.

"In refusing to hold as law in the decision of said cause each "proposition presented by the plaintiff in error in writing to the "Court and prayed to be held as law.

"In finding the issues for defendant in error.

"In overruling the motion of plaintiff in error for a new trial

"In entering judgment for defendant in error.

"The judgment of the Court below was not warranted by the "law or the evidence.

(Printed Record, p. 28.)

On the 29th day of January, 1883, the Supreme Court of Illinois affirmed the judgment of the Circuit Court of Ford county.

(Printed Record, p. 46.)

Thereupon the plaintiff in error sued out of the office of the Circuit Court of the United States for the Southern District of Illinois, a writ of error commanding the Justices of the Supreme Court of Illinois to send the record of said cause to this Court for review.

Said writ of error, with proper bond, citation, etc., was presented to Hon. John M. Scott, Chief Justice of the Supreme Court of Illinois, and by him approved. Said Chief Justice certified that said cause drew in question the validity of a statute of the State of Illinois on the ground of said statute being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute; and there was also drawn in

question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege or exemption specifically set up or claimed under such clause of said Constitution.

(The said bond, writ of error, citation, etc., are set forth on pages 47, 48, and 49 of Printed Record.)

The statute on which said judgment is sought to be maintained is now found in Chapter 114 of the Revised Statues of Illinois, the numbering of its sections having been changed by revisions.

(The sections or portions of that chapter having any bearing on the present case are found on pages 884 and 885 of Hurd's statutes of 1883.)

Section 125 (originally No. 3) provides as follows:

"If any such railroad corporation aforesaid shall make any unjust discrimination in its rates or charges of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car, upon its said road, or upon any of the branches thereof, or upon any railroads connected therewith, which it has the right, license or permission to use, control or operate *within this state*, the same shall be deemed guilty of having violated this act, and upon conviction shall be dealt with as hereinafter provided."

Section 126 (formerly section 3) provides as follows:

"If any such railroad corporation shall charge, collect or receive for the transportation of any passenger or freight of any description, upon its railroad for any distance, *within this State*, the same, or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation, in the same direction, of any passenger or like quantity of freight, of the same class over a greater distance of the same railroad; * * * or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, the same or a greater amount of toll or compensation than it at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in

"the same direction, over a greater distance of the same railroad; " * * * all such discriminating rates, charges, collections or "receipts, whether made directly or by means of rebate, draw-"back or other shift or evasion, shall be deemed and taken "against any such railroad corporation, as *prima facie* evidence "of unjust discrimination, prohibited by the provisions of this "act, &c."

Section 127, of the same act, provides that any corporation found guilty of extortion or unjust discrimination shall be fined not less than $1,000, and not more than $5,000 for the first offense. The statute also provides that all persons aggrieved by reason of the commission of any of the offences therein specified, shall have the right to recover, from the offending corporation, three times the amount of damages sustained, together with costs and a reasonable attorneys' fee.

The extracts given above contain all the statutory provisions relevant to the action.

We now assign as errors, the following:

The Supreme Court of Illinois erred in said cause in affirming the judgment rendered by the Circuit Court of Ford County.

The Supreme Court of Illinois erred in holding that the rates for the transportation in controversy were controlled by the Illinois Statute.

The Supreme Court of Illinois erred in refusing to sustain the defense of the plaintiff in error, founded upon the third clause of section 8 of articicle 1 of the Constitution of the United States.

ARGUMENT FOR PLAINTIFF IN ERROR.

The issue in this case is clear and sharp. It is admitted that plaintiff in error did charge and receive from Baily & Swannell a

higher and greater rate of toll or compensation for transporting certain freight from Gilman, in the State of Illinois, to the City of New York, than it charged Elder & McKinny for transporting the like quantity of freight of the same class, in the same distance, at the same time, from Peoria to New York, a greater distance.

It is also admitted that Peoria is a greater distance from the eastern boundary of the State of Illinois than Gilman, and that freight in course of transportation over the railroad of plaintiff in error, from Peoria to New York, passes through the station of Gilman. The plaintiff in error did charge the higher rate for the shorter distance.

When the cause was presented to the County Court of Ford County, that court was clearly of opinion that the statute of Illinois had nothing whatever to do with the rates in question, and sustained a demurrer to the declaration, believing that the statute did not apply, and was only intended to operate on commerce purely domestic; the Court also held that there was no question of Federal law in the case, and therefore overruled the application for removal to the United States Court.

We would have supposed, from the title of the act, as well as from the phraseology of its provisions, that those who framed it never intended it to apply to commerce among the States. It is never to be presumed that such a purpose was contemplated.

This question was fully considered and determined by the Supreme Court of New Hampshire, and was raised under a statute precisely like that of Illinois in this respect.

Merrill v. *Boston and Lowell Railrod*, 21 Am. and Eng. Railroad Cases, p. 48.

We suppose, however, that when the Supreme Court of a State construes a Statute of that State, this Court will not inquire whether that construction be sound or unsound, but will accept such interpretation. It remains therefore to inquire whether the application given to the Illinois railroad laws by the Supreme Court of Illinois does or does not bring it in conflict with the constitution of the United States.

When the cause was first presented to the Supreme Court of Illinois an opinion was rendered which will be found on page 476 of volume 104 of the Illinois Reports. The opinion rendered on the second hearing is entered in the record now before this Court, and is found on page 30.

From the commencement of the action, the plaintiff in error contended that the rates charged by a common carrier for the transportation of freight from a point within the State of Illinois to a point in a distant State were matters with which the legislature of Illinois has nothing to do; that such transportation falls within the description of "commerce among the States," and is controlled by the constitutional provision to which we have already referred. The plea of *nil debet* would no doubt have raised the question, as it threw upon the plaintiffs the burden of proving every fact necessary to establish the liability of the defendant under a valid law, properly interpreted. The prosecution was of a penal character, and could only be sustained by proper facts and binding law. But in order to obviate any question as to what was relied upon as a defence, the plaintiff, by demurrer to the declaration, by special plea, by written propositions presented to *nisi prius* Court, and by assignment of errors and argument before the Supreme Court, set up and pressed

the constitutional question. There can therefore be no doubt that the record itself shows that a question of Federal law was involved.

In the first opinion rendered by the State Supreme Court, it is not disputed that the application of the Statute contended for by defendant in error, would cause it to operate on inter-state commerce. But it is insisted that such a regulation belongs to that class of instances in which it is held that a State may act in the absence of congressional action. The Illinois Court in that opinion, says:

"Should Congress, under the provisions of the constiution "which authorizes the regulation of commere among the States, "pass a law regulating the charges of all railroad companies "engaged in inter-state commerce, it may be that the laws of "this State might then be confined to charges for the transporta- "tion of property wholly within the State, but no such law has "been passed, and that question does not arise."

It is thus not denied that the construction given by the Court to the statute does render it applicable to inter-state commerce. Indeed, the Court expressly decided that there was nothing in the law "which would confine the unjust discrimination to charges for "the transportation of property within the limits of the State."

104 Ills. pp. 484 and 485.

When the cause came before the Court the second time, a change of reasoning is observable. No attempt is made to show that until Congress should act, the Legislature of Illinois was free to regulate commerce between Illinois and other States, but it was said that the discrimination complained of as to the entire distance between Peoria and New York, and Gilman and New York, "presumably affects every part of the line of carriage, and "the State line proportionately with the balance of the line."

It will be observed that the declaration itself shows that the railroad of plaintiffs in error did not extend to New York City. It did extend to Toledo in the State of Ohio. Beyond that point plaintiff in error was compelled to make such arrangements as it could with connecting lines for the continued carriage of the freight in question across the States of Ohio, Pennsylvania and New York, or through Michigan and other States. It is also shown by the declaration that in each instance the contract of carriage and transportation was an entire one, and embraced all the distance between the places of shipment and destination. Those contracts did not in any way refer to the distance between Peoria and Sheldon on the eastern boundary of the State, or between Gilman and that boundary. So far as the bargain between the parties was concerned county lines had quite as much to do with the matter as State lines. The shippers could have presented their freight for transportation to the State line had they been so disposed, and the railroad company would have been compelled to transport it at the rates fixed under the Illinois Statute, and to conform to that statute in everything. But no such demand was made. The railroad company was not required by any rule or law to transport the freight beyond the terminus of its road at Toledo. If it chose to make arrangements with other lines to continue such transportation eastward, and found that it could make such arrangements, this was a matter for itself to determine. Shippers might insist on sending their freight to the end of the railroad of plaintiffs in error, and latter would have been bound to accept as a common carrier. But when a shipper asked the railroad company to do something which it was not bound to do, and transfer freight beyond its own lines, such company could fairly require that the contract be made an entire one.

In the instance referred to in this case such was the state of things existing. The contracts in question were single and entire. But the Supreme Court of the State severed and apportioned these contracts in order to find something to which the regulating power of the statute could attach.

At this stage of the argument we respectfully submit that it is within the power of every shipper to remain within the operation of the State law, if by so doing he can best advance his interests. He may ship to the State line whenever he pleases, and from thence continue the transportation under new contracts or other local laws, if local laws have any application. But if he chooses to ask the carrier to carry into other States and beyond its line, and intends to insist that such carriage be controlled by Illinois laws, he must so state when he ships his freight, and he must not accept a through contract and a through rate which does not purport to be covered by the Illinois laws.

We do not deny that when a common carrier agrees to transport freight beyond the limits of its own line, it is bound to perform that agreement, and is subject to all the obligations with respect thereto which the common law imposes on carriers. It must transport the freight safely, and within a reasonable time. But such carrier has a right to insist that if it shall contract to do what it is not bound to do, and continue the transportation by arrangement with other carriers and to distant points, such obligation shall only be assumed under an entire agreement, and that when made, such agreement shall not be subject to local rules or statutes not applicable to the whole service to be performed. Plaintiff in error had no power to compel railroads in Ohio or New York to observe rules prescribed by the legislature of Illinois. And every shipper knows this. The New York rail-

road companies are not prohibited by law from discriminating in favor of such western points as furnish them with a large volume of business. The shipper who desires an Illinois railrod company to make a through contract for itself and for other roads not subject to the laws of Illinois, assents to the unity of the contract for all purposes.

It is true the declaration in this case alleges that the party against whom the discrimination is said to have been made protested against the rate charged, or paid under protest. This we submit is not enough. He wanted the railroad company to carry the freight—not only beyond the State—but beyond its own lines. It was not bound to do so. If he had so elected he could have tendered the freight for shipment over those roads which plaintiff in error owned or operated. Plaintiff in error would have been bound to accept the freight, and thus the shipper could have tested the question, whether, with reference to transportation which it was bound to perform, namely, from Illinois to Toledo, Ohio, the Illinois regulation should prevail for the whole of the distance or any part thereof.

In the case at bar no such thing was done. The shipper merely protesting against the rate charged, elected to accept a contract which the railroad company for itself and a number of other roads doing business in other States, was willing to perform, but which it was not bound by any law to undertake.

THIS IS A PROCEEDING WHOLLY STAUTORY.

We have not seen the brief of the present Attorney-General in this case, but suppose he will take the same positions as were taken by his predecessor in the State Supreme Court.

It was insisted that the action could be maintained on common law grounds without regard to the statute. Considering that the common law did not give a penalty to the State—that the action was founded on the statute—we shall not spend time in discussing this question. It may be regarded as reasonably well settled that when an action brought to recover a penalty given by statute, the party complaining must bring himself or itself within the provisions of such statute to recover. The State Supreme Court did not even refer to the proposition thus contended for by the Attorney-General.

THE REAL QUESTION.

The only question or questions really presented in the case are these: Can a State Legislature regulate the rates of toll or compensation which a common carrier may charge for transporting from a point in one State to a point in another? And when freight is carried from one State to another under an entire contract covering the compensation of several carriers owning lines in different States, can the legislative authority of one of such States apportion such entire contract so as to control the rates for a part of the distance?

It cannot be successfully contended that the transportation of freight from a point within one State to a point within a distant State falls within the definition of domestic commerce, as inter-state commerce. The moment when freight is received by a carrier for such transportation the character of inter-state commerce attaches to it whether within or without the State of original shipment. The words of this Court in the case of the "Daniel Ball," 10th Wallace 557, are directly in point:

"In this case it is admitted that the steamer was engaged in "shipping and transporting, down Grand river, goods destined "and marked for other States than Michigan, and in receiving

"and transporting up the river goods brought within the State for "without its limits, but inasmuch as her agency in the transpor- "tation was entirely within the limits of the State, and she did "not run in connection with or in continuation of any line of "roads or railway leading to other States, it is contended she "was engaged entirely in domestic commerce. But this con- "clusion does not follow. So far as she was employed in trans- "porting goods destined for other States, or goods from without "the limits of Michigan and destined for places within that "State, she was engaged in commerce between the States, and "however limited that commerce may have been, she was, as far "as it went, subject to the legislation of Congress. She was "employed as an instrument of that commerce, for whenever a "commodity has begun to move as an article of trade from one "State to another commerce in that commodity has commenced. "The fact that several different and independent agencies are "employed in transporting the commodity, some acting entirely "in one State, and some acting through two or more States, does "in no way affect the character of the transaction."

In the case of *Railroad Co.* v. *Husen*, 5 Otto, 470; this Court says, "transportation is commerce," and that, as to inter-state commerce, "the State can no more prohibit or regulate it than it can that which is with foreign nations."

Hall v. DeCuir, 95 U. S. 485.

The doctrine thus laid down, unless afterwards overruled by the same authority which declared it, ought to be regarded as settling the main question in this case. It certainly does establish a principle which forbids the apportionment by local law, of transportation service between distant States, in such a manner as to subject one part of the service to State regulation, which can not be applied to the whole.

Many years ago controversies arose as to the true interpretation of Section 8, of Article 1, of the Federal Constitution, which declares that "Congress shall have power to regulate com- "merce with foreign nations, and among the several States, and "with the Indian tribes."

It was for a time a matter of dispute how far the power thus vested in Congress could be exercised by the States. This was to be determined by that class of courts to which the constitution refers the ultimate determination of all questions involving its own construction.

In the earlier decisions some confusion is found, and many differences of opinion. And it is no doubt true that difficulties still arise from time to time as to the true application of the constitutional principles in given cases. We think, however, that a rule has been established by which this and like cases may be determined.

It is settled that for some purposes, and within certain defined limits, the States may, in the absence of Congressional action, exercise some of the powers vested in Congress, under the clause referred to. But we think this Court has been careful to guard against the construction given to that clause by the Supreme Court of Illinois.

As we understand the settled rule it is this: Where the regulation in question is of a purely local, as distinguished from a national character, *and* does not admit of general application, then it may be adopted and enforced by local authority. But where the subjects of regulation are of national concern, or admit of one uniform plan or system of regulations, then the power to make such regulation is exclusively in Congress.

Cooley v. *Philadelphia*, 12 Howard 299.
Leman v. *People*, 20 N. Y. 252.
Gilman v. *Philadelphia*, 3 Wallace 713.
License Cases, 7 Howard, 283.
Thames Bank v. *Hornell*, 18 Conn. 500.

Passenger Cases, 7 Howard 283.
State Freight Cases, 15 Wallace, 232.
Henderson v. *Mayer*, 92 U. S. 259.
Sherlock v. *Albring*, 93 U. S. 99.
Welton v. *United States*, 91 U. S. 275.

One of the earliest cases is that of *Gibbons* v. *Ogden*, 9 Wheat. 196. It was there determined that the power to regulate commerce between the States is vested in Congress by the Constitution, and cannot be concurrently exercised by Congress and the States. In that case Congress had exercised the power, and the Court held that under the act of Congress then being considered, the States were permitted to make certain local rules, but as the general power was vested in Congrass the power of local regulation was derived from the act of Congress, and limited thereby. A number of decisions were afterwards rendered by this Court which subsequently became the subjects of controversy.

Homes v. *Jennison*, 14 Peters 570.
Brown v. *State of Maryland*, 12 Wheat. 446.
New York v. *Miln*, 11 Peters 158.

It was contended in *Wilson* v. *Blackbird, etc.* 2 Peters, 250, that the Supreme Court of the United States had decided that a State was free to exercise the power of commercial regulation when no conflict was produced with an act of Congress. But in the *Passenger Cases*, 7th Howard 287, this Court held that such was not the true meaning of the *Wilson Case*.

In the *Passenger Cases* may be found the principle afterwards adhered to. The Court held that the power of States to regulate commerce could only be exercised in matters purely local, and lays down the rule that the regulation of commerce consists as much in negative as in positive action.

It shows that while the States may do many things by which foreign commerce may be affected, they can not assume to regulate it by direct action.

In *Cooley* v. *Board of Wardens of Philadelphia*, 12 Howard, 311, this Court held that a certain regulation imposed by State authority on the business of pilotage were not void as in conflict with the constitutional provision under discussion. The business of pilotage is especially local. All harbors and rivers have their peculiarities, and the study of their peculiarities and the proper means of overcoming local obstacles make the difference between the pilot and the sailor. As to some rivers and harbors, great skill and long study and practice is required, while as to others little is necessary. The Court therefore held that the subject of pilotage was a matter of local and not of general regulation.

In *Gilman* v. *Philadelphia*, 3 Wallace, 713, the Court sustained a law of Pennsylvania authorizing the construction of a bridge over a navigable river, but this conclusion was reached because it could not be made the subject of any system of regulation uniform throughout the States.

In the *State Freight Tax Cases*, 15 Wallace, 232, the Court asserts broadly that transportation is commerce, and the power to regulate commerce between the States is exclusively in Congress. Reference is made to certain causes in which local regulations relating to pilotage, bridges, etc., have been sustained, but they are not regarded as affecting the general rule.

It is decided in the *State Tax on Railway Gross Receipts*, 15 Wallace, 284, that a State tax on the gross revenues of a railroad in Pennsylvania was not unlawful, although the revenues affected by the tax were derived in part from inter-state commerce. This

Court held that a State might tax a railroad chartered by it upon any system of valuation, and that when its revenues reached its treasury they were not protected from taxation because derived from a class of commerce upon which the State could impose no burden. Such a tax was held not to be placed on commerce or transportation at all, but on property, which, like all other property in the State jurisdiction, is subject to State taxation. Such a tax might indirectly affect inter-state commerce, as well as domestic commerce. This rule is entirely consistent with that which the Court afterwards announced in certain railroad and warehouse cases, to the effect that regulations imposed by State authority on property stored in warehouses, or transported between points within such States, are not void, because this might indirectly affect commerce between the States. Indeed it can not be disputed that many laws, rules and regulations, established and enforced by State authority, do very materially, although indirectly, affect all classes of commercial intercourse, the validity of which laws or regulations never have been and never can be questioned.

The general principle for which we are contending is laid down in *Henderson* v. *The Mayor of New York*, 92 U. S., 259, as follows:

"Though it be conceded that there is a class of regulations "which may affect commerce, both with foreign nations and "between the States, in regard to which the laws of the States "may be valid in the absence of action under the authority of "Congress on the same subjects, this can have no reference to "matters which in their nature are national, and which admit of "one uniform plan of regulation."

And again, the Court referring to former cases in which local regulations were sustained, declares that the States could not exercise such powers in any class of instances which are of national concern, *and* admitted of uniform legislation.

In *Welton* v. *Missouri*, 91 U. S. 275, the Court again asserts the doctrine that the non-exercise of power by Congress as to such matters, relating to inter-state commerce, as are of national concern, or might be the subject of a uniform plan or system of regulation, is "equivalent to a declaration that commerce should "be free from any restriction."

The confusion that existed in the earlier cases on this subject is commented on by this Court in the case of the *County of Mobile* v. *Kimball*, 102 U. S. 690, and the Court points out with great clearness the instances in which, for special reasons, local or State regulations of commerce may be sustained. It also defines what constitutes commerce with foreign nations and among the States:

"Commerce with foreign countries and among the States, "strictly considered, consists in intercourse and traffic, including "in these terms, navigation and the transportation and transit of "persons and property, as well as the purchase, sale and "exchange of commodities. For the regulation of commerce as "thus defined there should only be one system, applicable alike "to the whole country, and the authority which can act for the "whole country can alone adopt such a system. Action on it "by separate States is not therefore permissible."

And once more the Court repeats its assertion, that as to all matters *that admit* of a general system of regulation non-action by Congress is a declaration that, as to such matters, commerce shall be free.

In *Webber* v. *Virginia*, 103 U. S., 344, the Court is still more emphatic. Speaking of non-action by Congress in the regulation of inter-state commerce, it says:

"Its non-action in such cases, with respect to any particular "commodity, or mode of transportation, is a declaration of its "purpose that commerce in that commodity, or by that means of "transportation, shall be free."

In the first opinion rendered by the Supreme Court of Illinois in this case, it was distinctly held that the statute in question was intended to operate on the transportation of freignts from points within to points without the State; and this without any attempt to apportion such contract of transportation or to confine the operation of the law to so much of the service as was performed within the State. The supposed necessity for such a law is also discussed (101 Ill., p. 485). But the Court, finding that State regulations of a local character had been sustained by the Court, although they *affected* inter-state commerce, proceeded to treat the statute now in question as such a local regulation, without regard to State lines or to service within the State. Afterwards, as we have seen, the Illinois Court changed its ground, and confined the operation of the statute to the portion of the service performed within the State. In the first opinion the entire contract was not apportioned, but in the second opinion that operation was performed.

The authorities relied upon by the Supreme Court of Illinois are *Peik* v. *N. W. R. W. Co.*, 94 U. S. 164, and *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155.

In the case last cited a Bill in Chancery was filed by the C. B. & Q. R. R. Co. to enjoin the officers of the State of Iowa from enforcing a certain law, passed by the Legislature of that State, regulating rates of transportation on railroads. It was alleged that such a law impaired the vested rights of the railroad company and of its mortgage bond-holders. The purpose of the bill was to defeat the law altogether by the process of injunction. Among the reasons assigned in the bill for the relief prayed was the allegation that the statute complained of was an attempt to regulate inter-state commerce. The real purpose of the proceed-

ing was to obtain a judicial decision that the law regulating rates was an invasion of chartered and vested rights, and that such a law must fall altogether. The inter-state question was merely thrown in as a make-weight.

If the law thus called in question was valid as to domestic commerce, the bill must necessarily fail. If it were sought to be applied to inter-state commerce, and thus brought in conflict with the Federal Constitution, the company would have a perfect remedy at law. Consequently no relief could be given in equity. This Court could not possibly decide that a statute having a perfectly valid operation might be improperly construed by other Courts, and proceed to decide that question in advance. The Court did hold that the statute was valid as to domestic commerce. Being thus valid we cannot conceive how any Court could proceed by injunction to defeat its operation or to decide in advance how other Courts must afterwards construe its application.

By examining this case itself it will be seen that this Court simply reaffirmed the doctrine asserted in *Munn* v. *Illinois*, 94 Ills. 114.

In the latter case there was no question of transportation at all. It involved warehouse services only. It was indeed argued that the rates imposed for storing freight affected commerce. Storage rates may affect, for good or evil, a vast volume of commerce, and so may the prices paid for grain, for insurance, etc., and many other conditions and regulations that form no part of commerce.

The very distinction which we have been trying to discuss was distinctly presented in the *Munn Case*. The warehouse in question was located in Illinois, and all its business conducted there. The grain stored therein might or might not be transported be-

yond the State. Storage was not part of transportation, nor did the warehouse company propose to engage in transportation. The use of the warehouse was no doubt valuable as incidental to transportation and in connection therewith, but was no part of it. The property stored therein was a part of the general mass of property within the State, and was not to be regarded as covered by the principle of inter-state commerce, the storage being no part of the transportation.

In that case an excellent instance is given of the manner in which commerce among the States may be indirectlly affected by local regulations. Mere warehousing of freight, not being a part of the act of transportation, and the freight stored being part of the mass of property subject to State regulations, inter-state commerce might be seriously affected by the laws of Illinois. But these laws were not for that reason void. Had the law sought to burden or regulate the act of carriage from one State to another a different question would have arisen. This Court itself points out the distinction by referring to the *State Tax on Railroad Receipts*, 15 Wallace 293, in which it was held that revenues arising from inter-state commerce, when brought into the treasury of the company, and thus made a part of the mass of property subject to State control, might be lawfully taxed; although the commerce from which it was derived could not be so taxed. The money in the treasury in the one case and the grain in the warehouse in the other were subject to State control and regulation.

Indeed the Court held that a warehouse within the State of Illinois, although used as an intrument of commerce, was no more a part of it than a dray used in transporting freight from one station to another.

As we understand the *C. B. & Q. R. R. Co. Case* it decided nothing but what was decided in the *Munn Case*. It holds that a State law regulating railroad rates may be upheld so far as domestic commerce is concerned, even though inter-state commerce might be thereby *indirectly* affected. But we do not understand that it intended to hold that the Legislature of Illinois could directly lay its hand on inter-state commerce, and prescribe regulations by which it should be controlled.

The case of *Peik* v. *C. & N. W. Co.* also relied upon by the Supreme Court of Illinois, is substantially the same as the case last cited.

That case also arose under a bill in Chancery filed by the holders of certain first mortgage bonds of the C. & N. W. R. W. Co. to restrain that company from obeying, and the railway commissioners from enforcing, a statute of Wisconsin which limited the rates charged for transporting freight and passengers on all railroads in that State. The bill alleged that the law impaired the vested rights of the company and the bond-holders, and sought to interfere with inter-state commerce. The latter objection, if valid, could be taken advantage of at law and would permit a good defense. The statute had a perfectly valid operation. And surely, such being the case, this Court could not enjoin the enforcement of the law because some other Court might, in the process of time, give it an improper construction and application.

In stating the question to be considered, the Chief Justice, in reading the opinion of the Court, said:

"This suit presents the single question of the power of the "legislature of Wisconsin to provide by law for a maximum rate "of charges to be made by the Chicago and Northwestern Railway

"Company for fare and freight upon the transportation of persons "and property carried within the State, or taken up outside the "State, and brought within it, or taken up inside and carried "without."

* * * * * * *

"The law is confined to State commerce, or to such inter-state "commerce as affects the people of Wisconsin. Until Congress "acts with reference to inter-state commerce it is certainly "within the power of Wisconsin to regulate its own fares, etc., "so *far as they are of domestic concern*. With the people of "Wisconsin this company has domestic relations. *Incidentally* "they may reach beyond the State. But certainly, until Congress "undertakes to legislate for those who are without the State, "Wisconsin may provide for those within."

The above extracts contain all that is said in *Peck* v. *C. & N. W. R. R. Co.*, applicable to this case and appear on pages 175 to 178 of 94 U. S.

The Supreme Court of Illinois seized on the above words and so applied them as to sustain the Illinois statute in its application to commerce between the States. Was such the intention of this Court? Having so often declared that transportation was commerce, and that commerce among the States was totally beyond State control, in every respect in which it was capable of being regulated under a uniform plan or system, did the Court intend to hold that Wisconsin could directly regulate that class of commerce without regard to its capability of being regulated by such uniform plan or system?

That the case thus referred to settles the question that a State may control the rates charged for transporting freight within its own borders is certain. But was it intended to hold that the State could also, by direct legislation, act upon commerce, conceded to be of an inter-state character, because Congress had taken no action with respect thereto, and without regard to the

inquiry whether such regulations might not be imposed and enforced by that body, which represents all the people of the States?

We respectfully submit that such was not the purpose of the Court, more particularly as such a question could not well be decided under such a bill in equity as we have referred to.

This brings us to the question, are rates for the transportation of persons and freight between the States such matters as can or may be regulated by congress?

We not only think they are, but we believe that the only power in existence by which such matters can be fairly and effectively regulated in this country by proper and uniform rules, is the Congress of the United States. At this moment the leading statesmen of the Nation are engaged in devising such a system of regulation. If a State can adopt such a plan with respect to its own internal commerce, the National Legislature, possessing powers extending to all parts of the country, exercising control as extensive as the commerce to be dealt with, can certainly do the same. The problem in a State and in the Nation is exactly the same, so far as principle is concerned, and differs only in degree. Not only this, but as respects the very class of commerce now in question the powers of State government are totally inadequate, as they can not provide remedies available in all parts of the country between which transportation is carried on, nor can they compel connecting lines of railroad in various sections to observe such rules as justice requires.

There is one case, and one only, as far as we know, in which it is held that such rules as those in question here must be regulated by State authority, because not capable of being controlled by any general and uniform system.

The Supreme Court of Mississippi in *Railroad Commissioners* v. *Yazoo V. & M. V. R. R. Co.*, 21 Am. and Eng. R. R. Cases, p. 6.

The whole reasoning of that Court is summed up in the following passage appearing on page 13 of the volume referred to:

"We think that regulating fares for the transportation of "persons and property does not fall within the class of matters "requiring or admitting of uniformity. Perhaps no subject "admits of and demands greater diversity with varying localities, "and circumstances justly affecting the value of service."

We confess we do not fully understand this reasoning. The Supreme Court of Mississippi seems to have reached the conclusion that Congress could not prescribe any general *plan* or *system* of regulation, because of the various conditions existing in different parts of the country. It is assumed that the rules to be prescribed could not possibly be adapted to varying circumstances, and therefore could not be enforced at all. We freely admit that one iron-bound rule as to the rates or duties could not be justly enforced upon all railroads. The rates properly allowed one class of railroads would be grossly unjust to another class. But does the constitution require this? It is not permitted to so classify railroads as to bring them all within such rules as would do justice to each class according to its condition?

It is a settled rule that the rates of freight charged by a railroad company must be uniform.

"These charges, however, must be uniform; that is the charges "should be the same for all persons similarly situated, and for "all freights of a like kind and quality for a given service. They "may divide passengers and freights into classes, with descriptive "distinctions and charge different rates for different classes for a "given service, but the charge should be uniform upon all per-"sons and freights within each class."

C. B. & Q. R. R. Co. v. *Parks*, 18 Illinois p. 464.

Under the provisions of Sec. 151 of the very statute of Illinois on which this action is founded, the R. R. commissioners of the State are required to prepare schedules of rates to be charged by each railroad in the State; and in execution of that power all the railroads of the State are classified, according to their circumstances, and the rates are controlled by that classification.

Hurd's Statutes of 1883, p. 886.

We think it not only true, that the Congress of the United States is fully competent to deal with the whole subject of commerce among the States, but that the Illinois statute provides a very strong reason why no authority other than Congress can deal with it properly.

The subject of discrimination is one of the most important, and at the same time one of the difficult elements of the problem. There are many considerations which in practice and fairness should be considered in prescribing rules concerning this branch of the subject. Whether discrimination can or can not be justified by circumstances is a matter of dispute in regard to which a great difference of opinion exists. A carrier may at one point on its line obtain very little business, and all freights from such points may run in one direction. At another point the supply of business may be very large, and the carrier may find return freights in large quantities. At one station freight may be furnished in train loads; at other stations it may be picked up by single car loads or less. The business at some stations may hardly justify the maintenance of agents.

At many places where competition exists a railroad company is compelled to accept such rates as may be fixed by competition or go without business altogether. While rates at such places

are low, they may be sufficient to pay the expense of the train service, and maintenance of track, and furnish a small surplus with which to pay fixed charges. In such instances it is better for the company to accept the smallest obtainable profit on the cost of the service than to run its cars empty through such stations. Indeed it is for the interest of shippers at all points that such business shall be taken, for the railroad company must have a revenue, and it must increase its rates at other points, if not permitted to earn anything where competition exists. In this very instance the railroads running to Peoria are compelled to compete with water transportation all the way to New York, and that, too, as against the Erie Canal, built by public money, and on which no tolls are charged.

We do not undertake to express any opinion as to the manner in which these questions should be decided, but we refer to them merely as showing, that so far as inter-state commerce is concerned, they should be determined by the adoption of some uniform system. The reasons which should control this question are set forth in *Ex-parte Koehler*, 21 Am. and Eng. Railroad Cases, and the notes appearing on pages 61, 62 and 68.

The Illinois statute adopts the theory that rates should be governed absolutely by mileage. Not only this, but Sec. 126 provides that discrimination shall not be justified by the existence of competition at any point or station. The law adjudicates in advance on the validity of a defense.

This is a matter that concerns the people of all the States having commercial interests with this State. And the problem should be solved by that body which represents the opinions and desires of the people of all sections. It is absolutely necessary

that whatever rules may be adopted shall be enforcable against any company whose railroad forms a link in the chain of inter-state commerce, so that one carrier shall not be subjected to restrictions from which others are free, and in order that each company may know what it may demand from connecting roads. And here we may remark that the case of the *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155, can hardly be considered as establishing the doctrine that a State may directly regulate inter-state commerce so far as it affects the citizens or residents of such State. To so hold would be to establish one law for the people of Illinois and another for the citizens of other States. Under such a rule a citizen of New York could not invoke the statute, and in every case the question of citizenship, or residence at least, would become material. A resident of New York who caused freight to be shipped from Illinois to his home State would have no remedy.

It cannot be successfully contended that because the people of a State have a pecuniary interest in imposing a burden or a regulation on inter-state commerce, therefore such commerce became so far "domestic" as to give to the people of that state the power to so control it. Such commerce does not, for that reason, lose its inter-state character. In this case the question of discrimination concerns the people of New York just as much as those of Illinois. Those who consume commodities have quite as great an interest in transportation as those who produce them. Suppose the shipment in question had been made on a New York railroad westward, and the New York company had contracted with the shipper for the entire transportation, partly over the road of the plaintiff in error, would the New York Courts have enforced the Illinois law against the New York company, on the

ground that the latter must have participated in a prohibited discrimination in Illinois? Would the Illinois Courts have enforced the law in such a case either against the New York company or the plaintiff in error?

It might be to the interests of the people of an interior State to impose taxes, burdens, or regulations on the passage of freight across her borders. It might be to the interest of seaboard States to tax, restrict on interfere with foreign commerce so as to obtain advantages for themselves. But they could not, by setting up an interest for themselve, convert that commerce that was properly foreign or inter-state, into domestic commerce in order to obtain control of it.

In order to justify the regulation of inter-state commerce by State authority such regulation must be in regard to matiers not only local, but such as are not of National concern. Not only this, but as we understand the law, the existence of a local interest, however great, does not confer upon the State the power to regulate that class of commerce in any instance in the subject matter is capable of being regulated by the action of a body representing *all* the people of *all* the States.

We respectfully submit that the mere fact that the people of a State have an interest in inter-state commerce, as between their one State and other States, does not justify them in treating such commerce as "domestic," and controlling it as such. If it be *inter-state* it cannot be domestic.

That this Court never intended to abandon its long settled doctrine that a State could not directly control or regulate inter-state commerce as to any matter admitting of regulation by a general and uniform system, is rendered clear by the case of *Hall* v. *De*

Cuir, 95 U. S. p. 485, the opinion in which case was rendered by the same Justice who delivered the opinion in the C. B. & Q. case. The question presented was, how far the State of Louisiana could regulate inter-state commerce, in the absence of Congressional action. The Louisiana statute was held void as impairing the exclusive authority of Congress. The Court said: "But we "think it may safely be said that that State Legislature which seeks "to impose a direct burden upon inter-state commerce, or to "interfere with its freedom does encroach upon the exclusive "power of Congress."

The original doctrine thus re-asserted is reported in *Gloucester Ferry Co.* v. *Philadelphia*, 114 U. S. p. 196.

So we assume that it is still the law.

THE QUESTION ONE OF POWER.

It may be insisted that in the cases wherein this Court denied the power of the State to control commerce, the regulations involved the imposition of taxes, obstructions and burdens, while in this case the regulations in question are beneficial and in aid of commerce. Whether the Illinois statute is or is not beneficial, so far as it operates on inter-state commerce, and while it can not be applied to all portions of the lines of transportation on which the freight is required to pass, may well be questioned. It may also be a disputed point whether, in ignoring the conditions which seem to justify discriminations under peculiar circumstances, it is really in aid of or in restraint of commerce. It is sufficient to consider whether the *power* exists in the State to decide these questions. If the power does exist, then the merits of the case are not before this Court. If the power does *not*

exist, then the reasons for attempting to exercise it do not affect the question. It was once contended in England that the crown might, by the exercise of the dispensing power, suspend the operation of a bad law, but not a good law. That doctrine did not prevail, nor has it ever been held that where the question is one of power the merits or elements of its exercise is of the smallest consequence. It is sufficient for us to say that determination of the question of regulations are referred to congress alone by the constitution.

Recurring to the cases relied upon by the Supreme Court of Illinois, we admit without hesitation that they do fully settle the question that a State may regulate rates of freight as far as they relate to transportation between points wholly within its borders, however such regulations may indirectly affect interstate commerce. But we deny that they were intended to overthrow the settled doctrine of the Court as established before that time and since re-asserted.

The people of all sections of the country are profoundly interested in freedom of commerce among the States, and in all rules and regulations by which that commerce is governed and controlled. With respect to commerce purely *internal* to any State, the people of other States may also be interested, and their well-being may be thereby very seriously affected. But that fact can not impair the right of the people of each State to control their their own domestic affairs in their own way. To that extent the people of each section of the country are dependent on the good sense and the moderation of the people of all other sections. For it is undoubtedly true that each State may, in the exercise undoubted sovereignty, largely influence the well-being of all other States.

But with respect to commerce not strictly local, which consists of transportation from State to State; which concerns parties at each end of the line of transportation; and which may be the subject of an uniform system of regulation, the rule of law is wholly different. As to such matters, the States cau not act, for the simple reason that the law refers the enactment of regulations, or non-enactment of regulations, to another authority. Under our system of goverment such questions are referred to the national authority in accordance with the national judgment. It is not for the States to decide whether regulations directly affecting inter-state commerce are wise or unwise. The constitution has required that such matters be determined by a body representing a larger constituency and more extensive interest.

RECENT DECISIONS.

While this case was pending in the Supreme Court of Illinois a similar question was pending before the Supreme Court of Iowa. The so-called Granger Cases were urged upon the Court, as establishing the proposition upheld by the Supreme Court of Illinois. But the Iowa Court, after full consideration, held the contrary, and denied the power of the legislature of that State to control the shipment in question.

Carton v. *Illinois Central Railroad Company*, 59 Iowa, pp. 148 to 153.

We take the following extract from the opinion of the Court:

"The cases of *State* v. *Munn*, 94 U. S., 114; *C. B. & Q. R. R.* "*Co.* v. *Iowa*, 94 U. S., 155; and *Peick* v. *C. & N. W. R. R. Co.*, "94 U. S., 164; do not appear to us to sanction the validity of "the act of the State legislature regulating the transportation of "freight and passengers between the States. They merely deter- "mine the power of the States to fix reasonable warehouse

"charges and reasonable charges for transportation of freight "within the boundaries of the States, respectively, and that when "such power is exercised, although it may incidentally affect com- "merce between the States, yet the laws of the States are not "regulators of inter-state commerce because of such incidental "results. That it was intended in those cases to approve legisla- "tion like that under consideration in this case it appears to us "is conclusively shown by the reasoning in the later cases of "*Hall* v. *De Cuir*, 95 U. S., 485; and *Railroad Co.* v. *Husen*, 94 "U. S., 465.

That Court also considered and determined the question of the apportionment of an entire contract, as adjudged by the Illinois Court, and distinctly repudiated the right to make such a severance, for the purpose of subjecting a portion of the service to the operation of the local law.

In November, 1884, the same question was before the Supreme Court of Kansas, and after a full examination of all the authorities cited above, the same conclusion was reached as by the Supreme Court of Iowa.

Hardy v. *Atchison, Topeka and Santa Fe R. R. Co.*, Am. and Eng. Railroad Cases, volume 18, p. 432.

The Circuit Court of the United States for the Southern District of Iowa decided the same question in the same way.

Kaeiser v. *Illinois Central Railroad Company*, Am. and Eng. Railroad Cases, vol. 16, p. 40.

See also *Illinois Central Railroad Company* v. *Stone* Am. and Eng. Railroad Cases, vol. 16, p. 416, and *Ex-parte Koehler*, receiver, 21 vol. Am. and Eng., Railroad Cases, p. 58.

The most exhaustive discussion of the question here presented was given by the Circuit Court of the United States for the Middle District of Tennessee, in the case of the *Louisville and Nashville Railroad Company* v. *Railroad Commissioners of Tennessee et al.*, Am. and Eng. Railroad Cases, vol. 16, p. 1.

The Circuit Judge and District Judges sat together and examined every case bearing on the question, so far as weknow. The case of the C. B. & Q. R. R. Co. and that of the C. & N. W. R. R. Co. so often referred to in the argument are carefully discussed, and all the judges concurred in the conclusion reached. The Court did not and could not hold the *Granger Cases* were intended to overthrow the general rule announced by this Court in a long line of decisions rendered before these cases, and afterwards re-affirmed. The Court in *L. & N. R. R. Cases* concurred with the Supreme Courts of the United States for the Eastern District of Iowa.

All the reasoning by which the Supreme Court of Illinois sought to justify the judgment rendered against the plaintiff in error was thoroughly examined, and all the cases relied upon were exhaustively reviewed. The utter inconsistency of such a judgment, with the settled doctrine of this Court as to the exclusive power of Congress to regulate every element of interstate commerce admitting of regulation under an uniform plan or system, was clearly pointed out. It was shown beyond reasonable question that either the doctrine of this Court to which we refer, or that of the Supreme Court of Illinois, founded, as we believe, on a misapprehension of the so-called *Granger Cases*, must give way. It is for this Court to determine which rule shall prevail.

It would be useless for us to attempt to elaborate the reasoning of the Court in the case to which we now refer, or to examine the authorities cited therein.

We might refer to the other cases, but many of them are cited on page 39 of volume 16, of the Am. and Eng. Railroad Cases.

In conclusion we remark that the bulk of the commerce of the country passes into or over many States. If it be regarded as local to each State through which it passes and subject to regulation by each State the consequence can hardly be foreseen. If the State in which such commerce originates in any instance is at liberty to prescribe regulations, the State into which freight is carried must be competent to do the same. This must be true whatever the law may be as to intermediate States. Every State will no doubt be anxious to do its best for the advantage of its own citizens. The regulations to which commerce may be thus subjected will probably be not only various but conflicting. The shipper at one end cannot avail himself of regulations existing at the other, and the duties imposed by one terminal State can not be performed in cases of long, through transportation, unless they are of the same character as the duties imposed by the other terminal State. Thus one State may permit moderate discrimination in the rates chargeable at competitive points, or with reference to the volume of business in each direction obtainable at various stations. These considerations enter into the equities of the railroad question. But if through transportation across many States, under entire contracts, is to be controlled by the local laws of each State traversed, or even by the conflicting laws of terminal States, the business of the country will suffer an embarrassment which the Constitution sought to avoid.

In fact, confusion such as was never before known must prevail, and the remedy for existing abuses will be found worse than the disease.

If statutory regulation is required it is a matter of profound national concern affecting all the people of all the States. It demands that remedies be furnished available in all parts of

the country. Railroad companies in the West, if subjected to such regulations as to the inter-state business, are entitled to the means of requiring connecting roads to conform to such general rules.

To us it seems clear that the reasons which we have given were those which prompted the framers of the Federal Constitution to vest in Congress alone the power of regulating that class of commerce which involves the exchange of products between all parts of the Union.

We know of no language which more perfectly states the law than that of this Court in *Mobile Co.* v. *Kimball*, 102 United States, 691.

"Commerce with foreign countries and among the States "strictly considered consists of intercourse and traffic, inclu- "ding in those terms navigation and the transportation and "transit of persons and property, as well as the purchase, sale "and exchange of commodities. For the regulation of com- "merce as thus defined, there can be only one system of rules "applicable to the whole country, and the authority which can "alone adopt such a system. Action upon it by separate States "is not therefore permissible."

H. S. GREENE,

for Plaintiff in Error.

118-557

APR 9 1886
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1885.

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vs.

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REPLY FOR THE PLAINTIFF IN ERROR BY W. C. GOUDY.

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In Error to the Supreme Court of Illinois.

REPLY FOR THE PLAINTIFF IN ERROR BY W. C. GOUDY.

The plaintiff in error is the owner of a railroad running through the State of Illinois to Toledo, Ohio, and engaged in the business of a common carrier. It had some arrangement, not disclosed in this record, with other owners of lines of transportation between Toledo and New York, by which it was able to make contracts for carrying freight to the latter city. Gilman is a station on the road, in Illinois, about one hundred miles nearer to New York than Peoria, another station in the same State.

On the 29th of August, 1881, the Wabash Railway Com-

pany, plaintiff in error, made a contract to carry a car-load of corn, weighing 26,000 pounds, from Peoria to New York for $39, and on the same day made another contract to carry a car-load of oil cake, being of the same class of freight as corn, weighing 26,000 pounds, from Gilman to New York for $65.

This act was held to be an unlawful discrimination by the supreme court of Illinois, prohibited by a statute of that State of May 2, 1873, and the judgment for a penalty of $1,000 was affirmed.

The supreme court of the State having construed the act of the Legislature so as to cover the acts of making the contracts, such construction will be accepted by this court, and if the statute so construed conflicts with the Constitution of the United States, a Federal question arises which gives jurisdiction to this court.

Insurance *v.* Treasurer, 11 Wall., 214.
Delmas *v.* Insurance Co., 14 *Ib.*, 661.

If the transportation of freight from points in Illinois to New York city, by a common carrier, in pursuance of an entire contract over its road and other connecting roads not owned by it, is commerce between the States, then a Federal question is presented by this record for the decision of the court. If such acts constitute commerce between the States, and are of that nature which can be regulated by general and uniform rules or laws, then the act of the Illinois Legislature conflicts with section 8, article 1, of the Constitution, and the judgment should be reversed.

I.

DECISIONS OF THIS COURT RELIED UPON TO SUSTAIN THE JUDGMENT OF THE ILLINOIS COURT.

An examination of the first opinion of the supreme court of Illinois in this case, reported in 104 Illinois, 476, cites the several Granger cases found in 94 U. S., 133–177, as conclusive of the questions involved. The second opinion (Printed Record, 30) apportions an entire contract for transportation from a point in Illinois to a point in New York, and holds that the State act controls so much of the distance as lies in Illinois.

The construction given to the Granger decisions demands an examination of them, to be followed by views of this court upon these questions as expressed in other opinions.

The first case is *Munn* v. *Illinois*, 94 U. S., 133. In that the subject was a warehouse situated in Illinois, where grain was received from boats or cars for storage, and in turn was delivered on other boats or cars to be transported. Some of the grain was brought from other States and some of it was taken to other States, while a part came from points in Illinois and was sent to other points in the same State. The Legislature fixed a maximum rate of charges for storage, and the validity of the act was challenged. The principal controversy was to the property rights of the owners of the warehouse, but the act was also attacked on the ground that it was a regulation of commerce between the States, which was claimed to be a power vested exclusively in Congress.

The opinion of the Court, delivered by the Chief Justice, disposes of that point with the following language:

"We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

"It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall., 293, that it is not every thing that affects commerce that amounts to a regulation of it within the meaning of the Constitution. The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the carts by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate on commerce outside its immediate jurisdiction. We do not say a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done."

Munn v. *Illinois*, 94 U. S., 135.

The next case was *C., B. & Q. R. R. Co.* v. *Iowa*, 94 U. S., 163, which was commenced by a bill in equity to restrain the enforcement of a statute of Iowa fixing rates for freight against the Burlington and Missouri railroad, which was operated by the complainant, an Illinois corporation, as lessee. The validity of the entire statute was denied for reasons presented in the argument, and among them was the claim

that it might interfere with commerce between the States, but there was no specific act alleged as constituting such commerce. The object of the suit was not to prevent an application of the rates to freight in transitu through the State or shipped from some point in the State to a point without.

The Court uses the following language only as to the point in question:

"The objection that the statute complained of is void because it amounts to a regulation of commerce among the States has been sufficiently answered in the case of Munn *vs.* Illinois. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there and its regulation is a matter of domestic concern. It is employed in State as well as interstate commerce, and, until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

C. B. and Q. R. R. Co. *v.* Iowa, 94 U. S., 163.

The next case is Peik *v.* C. and N. W. R'y Co., 175. Two suits in equity were filed against the State officers to prevent the enforcement of the act limiting the rates on all railroads in the State to which the company was made a defendant to restrain it from obeying the law. The complainants were bondholders and stockholders. It was claimed that the act impaired the obligation of contracts, that private property was taken without making compensation therefor, and that the owner was deprived of his property without due process of law. These were the main propositions. But it was also

asserted that the act was a regulation of commerce between the States. The charter of the company was subject to a reserved right in the State to alter or repeal it.

The act contained a provision that it should not apply to freight carried across or through the State—should not be affected by it, and, by implication, did embrace freight taken from one point in Wisconsin to some point in Illinois, or from a point in Illinois to a point in Wisconsin, as well as freight transported entirely within the boundaries of Wisconsin. But the question in regard to articles carried out of the State or into it from another was not presented as a separate one. The contest was as to the validity of the act as a whole. The court, in the opinion, uses the following language as to interstate commerce:

"As to the effect of the statute as a regulation of interstate commerce, the law is confined to State commerce, or to such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations; incidentally these may reach beyond the State; but certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

Peik *v.* C. and N. W. Railway Co., 94 U. S., 177.

From these decisions certain conclusions were drawn and have been asserted in different courts.

It has been claimed—

1. That transportation by railroads is not commerce.

2. That fixing the rates for transportation is not a regulation of commerce.

3. That transportation from a point in one State to a point in another is not commerce between the States, and that if transportation can be called commerce between the States in any case it is only that which is carried through or entirely across one State.

4. That, in the absence of legislation by Congress as to rates, each State may enact rules and laws fixing the rates to be charged by a railroad company.

5. That the regulation of transportation by railroad companies created in a particular State, by fixing rates, is merely the exercise of police power over its own corporations.

In the case now before the Court the supreme court of Illinois adopted some of these propositions, sustained the act of the Legislature, and affirmed the judgment.

It was held that the act was an exercise of power over the railroad corporations of the State,—they having domestic relations with the people of the State,—was not a regulation of commerce within the meaning of the Federal Constitution, and that commerce between the States was only incidentally affected. Reference was made to the three cases reported in 94 U. S. for authority. (104 Ills., 483.) It was said, when the cause came before that court again, that the rates fixed by the State must govern as to freight for the distance carried within the State, although there was an entire contract for a definite sum by the contract from a point in Illinois to New York. (Printed Record, 30.) This, in effect,

was a decision that each State could control its own corporations as to rates for freight shipped in the State to another State; and, further, that it would be presumed that the rate per mile for the whole distance, over different lines of road owned by different corporations, was the same, and that corn and oil cake belonged to the same classes of freight in Indiana, Ohio, Pennsylvania, and New York as was fixed by the Legislature of Illinois for that State. On this theory the penalty was enforced.

It must be admitted that the conclusions drawn from the decisions in 94 U. S., without reference to other opinions of this court, are not wholly without justification. The case which goes farthest to support the decision of the court below is the *Peik case*. There it seems to be held or assumed that freight taken from a point in Wisconsin to a point in another State, or brought from a point in another State to a point in Wisconsin, may be regulated by the law of that State. It is not quite clear whether the decision rests upon the proposition that carrying between such points is not interstate commerce, or is of that local nature which may b controlled by State authorities in the absence of legislatio on the subject by Congress. Both are claimed, and, perha with equally good reasons.

II.

DECISIONS OF THIS COURT AND OF OTHER COURTS IN CONFLICT WITH THE ILLINOIS DECISION.

Since the Granger cases were decided in 1876, these questions and similar ones involving the same principles have been argued and decided. With the single exception of the

supreme court of Illinois, in the case now before the court, no court has sustained the fixing of rates on passengers or property transported from one State to another. Indeed, it may be asserted that the negative of every proposition on which such a statute can be sustained has been decided by this court. The attempted regulation of transportation from one State to another by the law of one State has been held invalid by the supreme courts of Iowa and Kansas, and by the circuit courts in the fifth, sixth, and eighth circuits.

I will trespass on the court so far as to quote from some of these cases:

County of Mobile v. *Kimball*, 102 U. S., 697-702:

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"And, as commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable rivers within the States connecting with them, falls within the power. The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe; its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would

otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens and against the products and citizens of other States; and it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation.

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"Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce, as strictly defined, and its local aids or instruments or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over com merce as thus defined may not be inaccurate, when it woul be so if applied to legislation upon subjects which are merel auxiliary to commerce."

The Daniel Ball, 10 Wall., 565:

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"In this case it is admitted that the steamer was engaged in shipping and transporting down Grand river goods destined and marked for other States than Michigan, and in receiving and transporting up the river goods brought within the State from without its limits; but, inasmuch as

her agency in the transportation was entirely within the limits of the State, and she did not run in connection with or in continuation of any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce, for whenever a commodity has begun to move as an article of trade from one State to another commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation it is subject to the regulation of Congress."

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Case of the State Freight Tax, 15 Wall., 274:

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"Considering it, then, as manifest that the tax demanded ... the act is imposed not upon the company, but upon the ...ight carried and because carried, we proceed to inquire ...ether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. Beyond all question, the transportation of freight or of the subjects of commerce for the purpose of exchange or sale is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one

State to another was the prominent idea in the minds of the framers of the Constitution when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer or from the place of production to the market was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution, § 1057, Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*, 7 Howard, 416, it was said: 'Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.' Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted."

Pensacola Tel. Co. v. *Western Union Tel. Co.*, 96 U.S., 8 and

"Congress has power 'to regulate commerce with foreign nations and among the several States' (Const., art. 1, sect. par. 3), and 'to establish post offices and post roads' (*Id.*, par. 7). The Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land. (Art. 6, par. 2.) A law of Congress made in pursuance of the Constitution suspends or overrides all State statutes with which it is in conflict.

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"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the General Government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

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Welton v. *State of Missouri*, 91 U. S., 280 and 282:

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"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, and some subjects which are local in their operation, it has been held that the State may provide regulations until Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.

"It will not be denied that that portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance and admits and requires uniformity of regulation. The very object of investing this power in the General Government was to insure this uniformity against discriminating State legislation. The depressed condition of commerce, and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court in commenting upon the power in question.

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"The fact that Congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled."

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Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 204:

"It needs no argument to show that commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation Congress alone, therefore, can deal with such transportation its non-action is a declaration that it shall remain free from burdens imposed by State legislation."

Brown v. *Houston*, 114 U. S., 630:

"The power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations. If not in all respects an exclusive power—if, in the absence of con-

gressional action, the States may continue to regulate matters of local interest only incidentally affecting foreign and interstate commerce, such as pilots, wharves, harbors, roads, bridges, tolls, freights, &c., still, according to the rule laid down in Cooley *v.* Board of Wardens of Philadelphia, 12 How., 299, 319, the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation. * * * All laws and regulations are restrictive of natural freedom to some extent, and where no regulation is imposed by the Government, which has exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the States it thereby indicates its will that that commerce shall be free and untrammeled, and any regulation of the subject by the States is repugnant to such freedom."

Walling v. *Michigan*, 116 U. S., 455:

"We have so often held that the power of Congress to regulate commerce with foreign nations, among the several States, and with the Indian tribes is exclusive in all matters which require or will only admit of general and uniform rules, especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions on the subject, the most important of which are collected in *Brown* v. *Houston*, 114 U. S., 622, 631, and need not be cited here."

Railroad Co. v. *Husen*, 95 U. S., 469 to 473:

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"It seems hardly necessary to argue at length that unless the statute can be justified as a legitimate exercise of the police power of the State it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition.

Whatever may be the power of a State over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

"The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power—that of destruction. It meets at the borders of the State a large and common subject of commerce, and prohibits its crossing the State line during two-thirds of each year, with a proviso, however, that such cattle may come across the line loaded upon a railroad car or steamboat, and pass through the State without being unloaded. But even the right of steamboat owners and railroad companies to transport such property through the State is loaded by the law with onerous liabilities, because of their agency in the transportation The object and effect of the statute are, therefore, to obstruct interstate commerce, and to discriminate between the property of citizens of one State and tha of citizens of other States. This court has heretofore sai that interstate transportation of passengers is beyond th reach of a State Legislature. And if, as we have hel State taxation of persons passing from one State to anothe or a State tax upon interstate transportation of passen gers is prohibited by the Constitution because a burden upon it, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State. Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it or burden laid upon it by legislative authority is regulation. (*Case of the State Freight Tax*, 15 Wall., 232; *Ward* v. *Maryland*, 12 *Id.*, 418; *Welton* v. *The State of*

Missouri, 91 U. S., 275; *Henderson et al.* v. *Mayor of the City of New York et al.*, 92 *Id.*, 259; *Chy Lung* v. *Freeman et al.*, *Id.*, 275.) The two latter of these cases refer to obstructions against the admission of persons into a State, but the principles asserted are equally applicable to all subjects of commerce."

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"But whatever may be the nature and reach of the police power of a State it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government. It was said in *Henderson et al.* v. *Mayor of the City of New York et al.*, *supra*, to 'be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States it is void, no matter under what class of powers it may fall or how closely allied it may be to powers conceded to belong to the States.' Substantially the same thing was said by Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat., 1. Neither the unlimited powers of a State to tax nor any of its large police powers can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while, for the purpose of self-protection, it may establish quarantine

and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. Upon this subject the cases in 92 U. S. to which we have referred are very instructive.

"In *Henderson* v. *The Mayor, &c.*, the statute of New York was defended as a police regulation to protect the State against the influx of foreign paupers; but it was held to be unconstitutional because its practical result was to impose a burden upon all passengers from foreign countries. And it was laid down that 'in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' The reach of the statute was far beyond its professed object, and far into the realm which is within the exclusive jurisdiction of Congress. So in the case of *Chy Lung* v. *Freeman*, where the pretense was the exclusion of lewd women; but as the statute was more far-reaching, and affected other immigrants, not of any class which the State could lawfully exclude, we held it unconstitutional. Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it was ruled that the right could only arise from vital necessity, and that it could not be carried beyond the scope of that necessity. These cases, it is true, speak only of laws affecting the entrance of persons into a State; but the constitutional doctrines they maintain are equally applicable to interstate transportation of property. They deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal Government.

"Tried by this rule, the statute of Missouri is a plain in-

trusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities.' Such a statute, we do not doubt, it is beyond the power of a State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

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That the power to regulate commerce cannot be asserted under the guise of the police power, reference is also made to—

Walling v. *Michigan*, 116 U. S., 460.

New Orleans Gas Co. v. *Louisiana Light Co.*, 115 U. S., 660.

Carton & Co. v. *Illinois Central R. R. Co.*, 59 Iowa, 150:

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"It is claimed by the defendant that whatever construction may be put on the law of this State, it can have no application to shipments of freight from this State to other States, because State legislation of that character is void as being contrary to article 1, section 8, of the Constitution of the United States, which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States.' Now, if this position be correct, it is needless to enter into a discussion of all the questions, so elaborately and ably discussed by counsel in this case. If the

law of Iowa, conceding that it contemplates the control or regulation of shipment of freight to other States, is in that particular void, as being an infraction of the Federal Constitution, it cannot be enforced, and the defendant was not bound to obey it, and could fix its own freight tariff, and the plaintiffs cannot recover for a violation of the statute, whatever other rights they may have.

"It is not claimed that the fixing of rates of freight shipped from one State into another is not a regulation of commerce. 'Any regulation of the transportation of freight upon the high seas, the lakes, the rivers, or upon the railroads or other artificial channels of communication is a regulation of commerce itself.' (The City of Council Bluffs *v.* The K. C., St. J. & C. B. R. Co., 45 Iowa, 338.) This has been repeatedly held by the Supreme Court of the United States. (Reading Railroad Co. *v.* Pennsylvania, 15 Wallace, 232; Passenger Laws, 7 Howard, 283; State of Pennsylvania *v.* Wheeling Bridge Co., 18 Howard, 421; Gibbons *v.* Ogden, 9 Wheat., 1.)

"There is a line of cases determined by the Supreme Court of the United States which hold that it is competent for the States, in the absence of legislation by Congress, to legislate respecting interstate commerce; but those cases have been such as relate to bridges or dams across streams wholly within a State, police laws, laws relating to pilots of vessels, health laws, and the like. (See Cooley *v.* Board of Wardens, 12 Howard, 299; Gilman *v.* Philadelphia, 3 Wallace, 713.)

"But that court has always held that the power to enact laws upon subjects in their nature national, and not merely local, is exclusively with Congress. In Cooley *v.* Board of Wardens, *supra*, it is said: 'Whatever subjects of this power are in their nature national or admit of one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive legislation by Congress.'

"That the act of this State, assuming that its object and purpose was to control and regulate the shipments of freight to other States, is of the character last defined appears to us

to be very clear, and we are not without authority upon this question, and from a source which, so far as questions involving the construction of the Federal Constitution are involved, are binding upon this court and all other courts in the Union.

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"The cases of State *v.* Munn, 94 U. S., 113; C., B. & Q. R. R. Co. *v.* Iowa, *Id.*, 155, and Peik *v.* C. & N. W. R. R. Co., *Id.*, 164, do not appear to us to sanction the validity of acts of the State Legislature, regulating the transportation of freight and passengers between the States. They merely determine the power of the States to fix reasonable warehouse charges and reasonable charges for transportation of freight within the boundaries of the States respectively, and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulation of interstate commerce because of such incidental results. That it was not intended in those cases to uphold legislation like that under consideration in this case, it appears to us, is conclusively shown by the reasoning in the later cases of Hall *v.* De Cuir, 95 U. S., 485; and R. R. Co. *v.* Hannen, *Id.*, 465."

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Hardy v. *A., T., S. F. R'l'd Co.*, 32 Kansas, 710:

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"The Federal courts have established that the transportation of merchandise from place to place by railroad is commerce; that the transportation of merchandise from a place in one State to a place in another is commerce among the States, or interstate commerce; that to fix or limit the charges for such transportation is to regulate commerce; that a statute fixing or limiting such charges for transportation from places in one State to places in another is a regulation of commerce among the States; that by the terms of the Constitution of the United States Congress has the

power to regulate such commerce. (Keiser *v.* Ill. Cent. R'l'd Co., 16 Am. and Eng. Railroad Cases, 40; Louisville & N. R'l'd Co. *v.* Railroad Comm'rs of Tenn., 16 Am. and Eng. Railroad Cases, 1; Carton *v.* Ills. Central R. R. Co., 59 Iowa, 148; 6 Amer. & Eng. Railroad Cases, 305, and the authorities there cited.)

"The debatable question is whether this power is concurrent with that of the States? Is the power of Congress exclusive? May a State act until its legislation is superseded or interfered with by Congress? May Kansas, in the absence of action by Congress, control or regulate, within its limits, the charges for the transportation of goods shipped from another State, under a contract made in that State, to a place in this State? We suppose it will be conceded that Kansas can pass no law which seeks to fix or limit the charges for the carriage of goods over the lines of its railroads which pass over its territory, but neither originate nor terminate within it, as, for instance, goods passing from Missouri to Colorado, Texas, or New Mexico. We suppose it will be conceded, also, that it is beyond the power of Kansas to fix the whole charge for the carriage of goods from a point in the State to a point in another. This would be an attempt to give our laws an extra-territorial force. If, however, the power of Congress to regulate commerce among the States—interstate commerce—which consists, among other things, in the carriage of persons and the transportation of goods from one State to another, is exclusive, then § 57 could not fix or limit the charges in controversy. This question is one upon which the decisions of the Supreme Court of the United States are final.

* * * * * *

"From these authorities and the cases therein cited, we think it is conclusively settled that the portion of either interstate or foreign commerce which consists in transit or traffic, including transportation in all forms, by land or by

water, and the purchase, sale, or exchange of goods, is national and susceptible of a uniform plan of regulation, and is, therefore, under the exclusive control of Congress. Even if Congress has not seen fit to prescribe any specific rules to govern interstate commerce, that does not affect the question. 'Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammeled.' (The State *v.* Saunders, 19 Kas., 127; Welton *v.* State of Missouri, *supra.*)

"Our opinion is, therefore, that § 57, which was repealed by the Legislature in 1883, if intended to apply to interstate commerce, was in violation to the Constitution of the United States, and, therefore, void.

"The conclusion we have reached could not be disputed were it not for the case of Peik *v.* Chicago and Northwestern R'l'y Co., 94 U. S., 164, and the language of the court in Munn *v.* State of Illinois, 94 U. S., 138, and Railroad Co. *v.* Iowa, *Id.*, 155. We confess it is difficult to reconcile these three cases with the principles which have been settled by the prior and subsequent course of decision of the United States Supreme Court if they decide that until Congress acts in reference to interstate commerce the Legislature of a State may regulate the transportation of freight and passengers among the States. These cases were decided in 1876, and the opinion in the Peik case was delivered by Chief Justice Waite; yet in the case of Hall *v.* De Cuir, *supra*, decided the next year, 1877, the Chief Justice quotes approvingly what was said by Mr. Justice Field, speaking for the Court, in Welton *v.* State of Missouri, 91 U. S., 282, that 'inaction (by Congress) is equivalent to a declaration that interstate commerce shall remain free and untrammeled.'

"Referring to those decisions, the supreme court of Iowa, in Carton *v.* Railroad Co., *supra*, uses the following language:

"The cases of Munn *v.* State of Illinois, 94 U. S., 113; Railroad Co. *v.* Iowa, *Id.*, 155; and Peik *v.* C. & N. W. R'l'd

Co., *Id.*, 164, do not appear to us to sanction the validity of acts of the State Legislature regulating the transportation of freight and passengers between the States. They merely determine the power of the statutes to fix reasonable warehouse charges and reasonable charges for transportation of freight within the boundaries of the States, respectively, and that when such power is exercised, although it may incidentally affect commerce between the States, yet the laws of the States are not regulations of interstate commerce because of such incidental results. That it was not intended in those cases to approve legislation like that under consideration in this case, it appears to us, is conclusively shown by the reasoning in the later cases of Hall *v.* De Cuir, 95 U. S., 485, and Railroad Co. *v.* Husen, *Id.*, 465.

"In the case of L. & N. R'l'd Co. *v.* R'l'd Comm'rs of Tenn., *supra*, Hammond, J., in commenting on the Peik case, says:

"In the Wisconsin case, the next in the series of the Granger cases, the court mainly deals again with what were evidently considered by all more important questions. Circuit Judge Drummond tells us the question was scarcely argued at all in the court below, and evidently it was only incidentally considered in the Supreme Court. (6 Biss, 177.) The Wisconsin act, unlike ours, contained an exception which excluded from its operation all rates of charges for carrying freight which comes from beyond the boundaries of the State and to be carried across or through the State. Possibly, notwithstanding its terms, the act may have been construed, within the purview of this exception, not only to persons and property coming from other States into Wisconsin, or going from that into other States, which was not thought, however, to be its construction in the court below, though the question whether it could so apply under the *State Freight Tax Cases*, 15 Wall., 232, was reserved and not decided in that court.

"In the Peik case the chief justice speaks of the power of Wisconsin to regulate its fares, etc., so far as they are a do-

mestic concern, even though incidentally they may reach beyond the State. Clearly a statute of the State prescribing rates of freight for goods, which shall be binding upon the railroad companies with respect to goods brought from another State, is a regulation of interstate commerce as much as a law imposing a tax upon such goods. Therefore it cannot be said that such a statute acts *incidentally*. It acts directly upon a commerce which is interstate. It does not, like laws imposing a tax upon gross receipts from traffic, affect such commerce *indirectly*. It assumes to regulate and control it as commerce, and has no other object and design. Therefore we cannot say, as was stated in the Peik case, that said § 57, if intended to apply to interstate commerce, merely incidentally affected such commerce.

"We have examined the case of The People *v.* W., St. L. & P. R'l'd Co., 104 Ill., 476. That portion of the case that is in any way applicable to this is largely based upon the construction given by that court to the three cases cited and reported in 94 U. S. Rep. For the reasons before stated, we think the Supreme Court of the United States never intended to establish the doctrine as broadly as contended in the Illinois case.

"Thus far we have discussed the question presented as though Congress had remained entirely passive on the subject. Such, however, is not the fact. In 1866 it passed an act authorizing all railroad companies to transport passengers and freight from State to State, and empowering them to receive and accept compensation therefor. It seems to us that the existence of this statute must be considered in discussing the power of a State to regulate interstate commerce. (See 14 U. S. Statutes at Large, 66; Rev. Stat. of U. S. (2d Ed., 1878), p. 1017, § 5258.).

"If Congress undertook by this statute to legislate upon interstate commerce, the exceptional decisions of the United States Supreme Court decided in 1876, including the Peik case, do not militate in the slightest degree against the views

announced herein. That each railroad company in the case before us issued its own way-bill to and from the connecting point with the defendant, and that each company was liable for the loss and damage occurring on its own road only, does not affect the question of interstate commerce. From the time the goods began to be moved from St. Louis, Missouri, until they were delivered at Hutchinson, in this State, they were the subject of commerce and commerce among States, and, therefore, interstate commerce.

"After a careful consideration of the whole record and the important questions involved, we decide that the plaintiff is not entitled to recover. The judgment, therefore, of the district court must be affirmed.

"All the justices concurring."

Kæiser v. *Ills. Central R. R. Co.*, A. & E. R. R. Cases, 41:

* * * * * * *

"If, however, the statute shall be held by its terms to apply to interstate commerce, I am of the opinion that it is in contravention of article 1, § 8, of the Constitution of the United States, which confers upon Congress the power 'to regulate commerce with foreign nations and among the several States.' The question is one of great importance, and, in some of its aspects, not free from difficulty. It has been much discussed in the courts of the country, and especially in the Supreme Court of the United States.

"The following propositions may now be laid down as settled, at least so far as the Federal courts are concerned:

"(1) The transportation of merchandise from place to place by railroad is commerce. (2) The transportation of merchandise from a place in one State to a place in another is 'commerce among the States.' (3) To fix or limit the charges for such transportation is to regulate commerce. (4) A statute fixing or limiting such charges for transportation from places in one State to places in other States is a regulation of commerce among the States. (5) The power to regulate

such commerce is vested by the Constitution in Congress. (6) This power of Congress is exclusive, at least in all cases where the subjects over which the power is exercised are in their nature national or admit of one uniform system or plan of regulation. (7) The State cannot adopt any regulation which does or may operate injuriously upon the commerce of other States.

"These general propositions are abundantly sustained by the following, among other, authorities: Crandall *v.* Nevada, 6 Wall., 35; Passenger Cases, 7 How., 283; Gibbon *v.* Ogden, 9 Wheat., 1; Case of State Freight Tax, 15 Wall., 232; Welton *v.* Missouri, 91 U. S., 279; Hall *v.* De Cuir, 95 U. S., 497; Railroad Company *v.* Husen, *Id.*, 469; Pensacola Telegraph Co. *v.* Western, &c., Tel. Co., 96 U. S., 9; Carton *v.* Ills. Cent. R. Co., 6 Am. & Eng. R. R. Cas., 305.

"It is insisted by plaintiff's counsel, in his very able and exhaustive argument in this case, that, conceding the soundness of these propositions, the statute in question may be upheld upon the ground that in enacting it the State exercised a power which is vested concurrently in the States and the General Government. That certain powers may be exercised by the States in the way of regulating interstate commerce where no act of Congress is interfered with may, for the purposes of this case, well be admitted.

"Assuming such to be law, the questions remain—

"(1) Whether the act in question, if applied to through shipments, or freight upon lines extending into or through several States, must not be held to relate to a subject which is in its nature national, or which admits of one uniform system or plan of regulation. (2) Whether, if the power of the State to pass such an act be conceded, it does not necessarily include the power to discriminate against the commerce of other States.

"If either of these questions is answered affirmatively, then the statute, in so far as it relates to through shipments over interstate lines, is in violation of the Federal Constitu-

tion. I am of the opinion that both questions must be so answered.

"It seems very obvious that the regulation of transportation of merchandise over a line extending, it may be, from the Atlantic to the Pacific Ocean, is a subject which is in its nature national. It is so because it necessarily concerns the people of the whole country and is beyond the legislative power of any single State. It is also apparent that such transportation not only admits of, but requires, a uniform system or plan of regulation. I do not understand the plaintiff's counsel as denying these propositions; but he insists that this State may regulate charges upon so much of the route as lies within its own territory. In other words, the contention of counsel is that each State over whose territory a line of interstate railroad passes may fix or limit the charges to be made for the carriage of a cargo upon that part of the route which lies within its own jurisdiction.

"The consideration of this proposition involves a determination of the second question last above stated, viz., whether the statute in question, construed as authorizing the regulation of charges within this State, may not affect charges made for carriage in other States. To state the question in another form, it is this: Can each of the States through which a cargo must pass in going, for example, from Des Moines to New York city, fix the proportionate charge which shall be made by the carrier for the distance within its own territory? Such a line would pass through portions of the States of Iowa, Illinois, Indiana, Ohio, Pennsylvania, and New York. How can Iowa fix the amount to be paid for the carriage from Des Moines to the State line without indirectly affecting the rates to be charged in the other States?

"It must be borne in mind that the power to regulate includes not only the power to reduce, but the power to increase charges. If one of the States upon such a line can fix the charges for carriage within its own territory, what is to pre-

vent it from authorizing its own carriers to demand and receive an undue and unreasonable proportion of the gross amount? If the proposition contended for be admitted, what is there to prevent the three States through which the cargo must first pass on its way to New York from exacting more than one-half of the charge for the entire route? Or, to state the same question in another way, why may not the five States through which the cargo would pass before reaching the boundary of New York exact in the aggregate the whole of a reasonable charge for the entire route, leaving nothing for the carrier within the State of New York? And since no State law can have any extra-territorial force, is it not clear that the attempt to enforce the statutes of each of the several States, in so far as the carriage within such State is concerned, would lead to conflicts and disputes which no State authority would be competent to adjust and determine?

"These considerations, I think, lead inevitably to the conclusion not only that such commerce is the subject only of national control and regulation, but that any attempt to devolve upon a single State the power to regulate it in part would necessarily give to such State the right to discriminate against other States of the Union.

"It is well known that one of the chief reasons which caused the constitutional convention to insert the commercial clause in the Constitution of the United States was the belief that if the power to regulate commerce among the States was not taken exclusively into the hands of the National Government rivalries and jealousies would arise among the States similar to those which had existed under the old confederation, which would lead practically to the destruction of interstate commerce, and it was regarded as specially important that no power in the Legislature of any one State to interfere with commerce or trade in any other State should be recognized as existing."

* * * * * * *

I also cite as directly in point the decision of the circuit court in—

Louisville & N. R. R. Co. v. *R. R. Com'rs*, 16 A. & Eng. R. R. Cases, 22.

And also the decision of the circuit court by the district judge in—

Ills. Central R. R. Co. v. *Stone*, 18 *Ib.*, 423.

I further cite decisions of this court upon the questions involved in—

Hall v. *De Cuir*, 95 U. S., 488.
Webber v. *Virginia*, 103 U. S., 344.
Pickard v. *Pullman*, March 1, 1886.

By these cases the following propositions are established:

1. The transportation of merchandise by railroad is commerce, as well as the buying and selling or exchange of such merchandise.

2. The transportation of merchandise from a place in one State to a place in another is "commerce among the States" within the meaning of § 8, art. 1, of the Constitution.

3. A statute fixing rates, or limits for rates, or comparative rates for the transportation of merchandise from places in one State to places in other States is a regulation of "commerce among the States."

4. When merchandise is shipped from a point in one State to a point in another State its character as interstate commerce is fixed from the time of shipment and not from the time it leaves the State.

5. The rates on such merchandise cannot be controlled by State legislation for the distance carried in the State from which it is started.

6. As the charges for transportation of articles of commerce from one State to another can, only be regulated by general uniform rules and laws, operating alike in all the States, and such merchandise cannot have a fixed *situs*, the power of Congress is exclusive.

7. The fixing of rates or charges for transportation is a power which may be exerted to fix a definite sum, or a maximum or minimum, and so be a burden upon the articles of merchandise; but whether so or not, a burden on the carrier is just as much a regulation of commerce. A rule which operates injuriously upon the carrier operates injuriously upon commerce.

8. A statute which regulates charges for transportation cannot be sustained upon the ground that it is an exercise of police power, because it invades the authority of Congress "to regulate commerce with foreign nations and among the States."

The Granger cases may be sustained and are not inconsistent with these principles. There was no separate question presented as to merchandise destined for another State. The statutes were held valid, and, so long as their provisions were applied to transportation within the State, no objection could be made. But the case now under consideration brings the question directly before the court as to the power of the State to regulate the charges of a railroad company on freight taken in one State under a contract to carry it into and de-

liver it in another State, on the roads of different owners, over which other regulations may prevail.

III.

Answers to the Propositions on which the Defendant in Error seeks to Sustain the Illinois Statute.

1. *It is claimed that the statute is not a regulation of the transportation of merchandise by railroad.*

It is conceded by the attorney general for the State that transportation is commerce, but it is insisted by him that this statute is not a regulation of transportation. It is said that the only object of the Legislature was to enforce the common-law obligation to treat all persons alike and without discrimination; that the rates are not fixed, but may be established by the carrier at any sum, treating all persons alike in the same circumstances.

If the statute did not contain the third section (112, Ch. 114, Revised Laws) there might be plausibility in this proposition; but that section makes arbitrary rules as to what shall amount to discrimination, depriving the carrier of the common-law rules, and preventing him from showing that shippers were in different circumstances, justifying a difference in the charges.

The third section makes distance for transportation the only rule, and prohibits the carrier from charging more for a shorter than a longer distance, rejecting all circumstances which might justify a difference in price. It goes further, and declares that the fact that the point from which the freight is shipped is a competing place with any other

means of transportation shall not be an excuse for different prices from other stations.

This section provides that the charges for receiving, handling, or delivering freight at all stations shall be the same, regardless of the different prices for labor or other expenses at the different stations.

It is not important to consider the propriety of these rules. The only material question is as to whether the Legislature undertook to *regulate* transportation. The common law required the carrier to transport a car-load of corn belonging to one person, which was received at a station destined for a certain other station on its own line, for the same price as was charged for a car-load of corn belonging to another person taken at the same station and carried to the same point as the other. If it cost the carrier more to handle freight at one point than another, or if the cost of constructing a distinct portion of the line over which one lot of freight was sent was more than another, an increased charge to cover such differences would not be unjust discrimination according to the common law. This statute makes a *regulation* which is different from that of common law.

If a railroad has a station on navigable water, or where there is another railroad, creating competition at that point, and in the course of that competition a lower rate is accepted than a fair and reasonable price, and less than is received at a non-competing point, that would not be unlawful discrimination by the common law; but this statute creates a *regulation* which makes such a difference unlawful discrimination.

If a railroad company charges less per mile for a long haul than a short one, that is not unjust discrimination by

the rules of the common law; but this statute establishes a *regulation* which makes it unlawful and exacts a penalty in addition to a liability for damages in a civil suit.

Although the rate is not fixed by the statute, it contains provisions *regulating* the duties and liabilities of railroad companies as common carriers to even a greater extent. If transportation is commerce, as is admitted, then this statute, which establishes rules regulating transportation, *regulates commerce.*

Peoria is situated on the Missouri river, where a waterway exists, by which freight may be carried to a market south, or north, or east, or to Europe. Peoria is a railroad center, where the shipper has his choice of routes to the same market or his choice of different markets.

Gilman is an inland place more than one hundred miles from water communication, and with only one other railroad, which runs north and south at right angles with the Wabash.

The fact that a less sum is charged from Peoria to New York than from Gilman to New York would not be evidence, by the rules of the common law, that the shipper at Gilman was required to pay more than a reasonable price; but this statute makes a *regulation* which is not only evidence of such fact, but *conclusive evidence.*

If the Knights of Labor compel the railroad company to pay more for handling the freight at Gilman than Peoria that cannot be shown in justification of the larger price while this statute is in force.

The attorney general for the State, however, claims that a regulation of rates is not a regulation of commerce. He presents the proposition that the law must prohibit or restrain the carrying of merchandise, or in some way impose

a burden directly upon the merchandise itself, such as a tax or impost. According to that theory the carrier can be compelled to discharge his duty to the public without regard to compensation for the service. On one side the carrier must transport the goods and on the other he is entitled to a reasonable compensation. A regulation of one is a regulation of the transportation, which is conceded to be commerce as much as the other.

The burden on the carrier is as much a regulation of commerce as a burden on the merchandise.

State Freight Tax, 15 Wall., 276, 279.
Hall v. *De Cuir*, 95 U. S., 489.

This is a question of power. If the Legislature can fix a maximum price, it can fix a minimum or even a definite price. If it can prohibit a charge of more for a less distance, it can authorize more for a less. The exercise of the power is regulation of transportation, which is commerce.

2. *It is claimed that, as Congress has not enacted laws in regard to discrimination or rates, the State may legislate upon that subject.*

The line has now been distinctly drawn between the cases where the power of Congress as to commerce between the States is exclusive and where it is concurrent.

Where the subject is local, such as the improvement of harbors, establishing wharves, building bridges, entirely within a State, or making local police regulations, such as the landing of vessels, &c., the State may control until Con-

gress acts upon the subject; but where the subject is of that kind which is national, or one requiring general and uniform laws to be effective, then the power of Congress is exclusive, and no valid act can be passed by a State Legislature. Non-action by Congress in such a case is a declaration that there shall be no legislation.

The argument that evils exist which need legislation to correct them is no justification for State legislation. It is for Congress to determine whether evils exist, and, if so, the remedy to be applied. The views expressed by Judge Walker, of the Illinois court, in a separate opinion, could only be addressed to Congress as a reason for legislation.

The decisions of this court, previously cited, place this question beyond debate. The rule is briefly stated by Mr. Justice Bradley, in *Brown* v. *Houston*, 114 U. S., 630, where he says: "The power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation." This is repeated with emphasis in Walling *v.* Michigan, 116 U. S., 455.

The only question to be considered now is whether the matter of the Illinois statute admits of one uniform system or plan. It certainly will not be denied that unjust discrimination by common carriers engaged in transporting merchandise between the States admits of one uniform system or plan of regulation, nor that charges or rates of such carriers can be regulated by one uniform system or plan. What obstacle exists to Congress enacting a statute in the language of the Illinois statute?

But this court has expressed its opinion on this point in

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S., 204, which we have quoted and repeat: "It needs no argument to show that commerce with foreign nations and between the States, *which consists in transportation of persons and property between them, is a subject of national character and requires uniformity of regulation.*"

3. *It is claimed that the Illinois statute can be sustained as an exercise of police power.*

If the subject is vested exclusively in Congress, then the police power of the State is suspended or delegated to the United States as to that subject. Under the guise of police power the State Legislature cannot act on a subject committed to Congress. The law on this point has been settled in the cases cited of *Railroad Company* v. *Husen*, 95 U. S., 469; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S., 660, and *Walling* v. *Michigan*, 116 U. S., 460.

The facts appearing in *Fuller* v. *Railroad Co.*, 17 Wall., 560, were only as to local police regulations, such as giving signals, speed, and stoppage of trains, &c. The law did not undertake to fix or prevent discrimination. It merely required the carrier to fix rates and give public notice of them.

The operation of the regulation made by the statute is directly on the transportation of the merchandise; it is not only regulation, but restriction; it interferes directly with the freedom of commerce between the States, which Congress has declared by non-action shall be "free and untrammeled." Commerce is not affected incidentally, but directly. The exercise of such a power may amount to prohibition.

If Illinois can prohibit a charge for the lesser distance, another State may adopt the opposite rule, or another State may fix a definite sum per mile for each pound, and thus burdens would be imposed not only on the carrier, but on the merchandise transported.

W. C. GOUDY,
For Plaintiff in Error.

118-557

Supreme Court U. S.
FILED.
APR 6 1886
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1885.

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Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendants in Error.

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BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

GEORGE HUNT,

Attorney General of the State of Illinois.

SPRINGFIELD, ILL.:
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STATEMENT.

At the April Term, A. D. 1882, of the Ford County Circuit Court, in the State of Illinois, suit in an action of debt was begun by the People of the State of Illinois against the Wabash, St. Louis & Pacific Railway Company, to recover penalties imposed

by the laws of the State upon railway companies doing business in this State, and being guilty of unjust discrimination or of extortion in the rates charged and collected for the transportation of freight or passengers upon such railway lines.

By an act of the General Assembly of the State of Illinois, to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this State, etc., approved May 2, 1873, in force July 1, 1873,—Statutes Illinois, chapter 114, it is declared:

"111. UNJUST DISCRIMINATION.] § 2. If any such railroad corporation aforesaid shall make any unjust discrimination in its rates or charges of toll, or compensation, for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its said road, or upon any of the branches thereof, or upon any railroads connected therewith, which it has the right, license or permission to operate, control or use, within the State, the same shall be deemed guilty of having violated the provisions of this act, and upon conviction thereof shall be dealt with as hereinafter provided.

"112 EVIDENCE.] § 3. If any such railroad corporation shall charge, collect or receive, for the transportation of any passenger, or freight of any description, upon its railroad, for any distance within this State, the same, or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation, in the same direction, of any passenger, or like quantity of freight of the same class, over a greater distance of the same railroad; or if it shall charge, collect or receive, at any point upon its railroad, a higher rate of toll or compensation for receiving, handling or delivering freight of the same class and quantity, than it shall, at the same time, charge, collect or receive at any other point upon the same railroad; or if it shall charge, collect or receive for the transportation of any passenger, or freight of any description, over its railroad, a greater amount as toll or compensation than shall, at the same time, be charged, collected or received by it for the transportation of any passenger, or like quantity of freight of the same class, being transported in the same direction, over any portion of the same railroad, of equal distance; or if it shall charge, collect or receive from any person or persons, a higher or greater amount of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons for receiving, handling or delivering freight of the same class and like quantity, at the same point upon its railroad; or if it shall charge, collect

or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons, for the transportation of the like quantity of freight of the same class, being transported from the same point, in the same direction, over equal distances of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, for any distance, the same or a greater amount of toll or compensation than is at the same time charged, collected or received from any other person or persons, for the use and transportation of any railroad car of the same class or number, for a like purpose, being transported in the same direction, over a greater distance of the same railroad; or if it shall charge, collect or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad, a higher or greater rate of toll or compensation than it shall, at the same time, charge, collect or receive from any other person or persons, for the use and transportation of any railroad car or cars of the same class or number, for a like purpose, being transported from the same point, in the same direction, over an equal distance of the same railroad; all such discriminating rates, charges, collections or receipts, whether made directly, or by means of any rebate, drawback, or other shift or evasion, shall be deemed and taken, against such railroad corporation, as *prima facie* evidence of the unjust discriminations prohibited by the provisions of this act; and it shall not be deemed a sufficient excuse or justification of such discriminations on the part of such railroad corporation, that the railway station or point at which it shall charge, collect or receive the same or less rates of toll or compensation, for the transportation of such passenger or freight, or for the use and transportation of such railroad car the greater distance, than for the shorter distance, is a railway station or point at which there exists competition with any other railroad or means of transportation. This section shall not be construed so as to exclude other evidence tending to show any unjust discrimination in freight and passenger rates. The provisions of this section shall extend and apply to any railroad, the branches thereof, and any road or roads which any railroad corporation has the right, license or permission to use, operate or control, wholly or in part, within this State: *Provided, however*, that nothing herein contained shall be so construed as to prevent railroad corporations from issuing commutation, excursion or thousand-mile tickets, as the same are now issued by such corporations.

"113. PENALTIES.] § 4. Any such railroad corporation guilty of extortion, or of making any unjust discrimination as to passenger or freight rates, or the rates for the use and transportation of railroad cars, or in receiving, handling or delivering freights,

shall upon conviction thereof, be fined in any sum not less than one thousand dollars ($1,000), nor more than five thousand dollars ($5,000), for the first offense; and for the second offense not less than five thousand dollars ($5,000), nor more than ten thousand dollars ($10,000), and for the third offense not less than ten thousand dollars ($10,000), nor more than twenty thousand dollars ($20,000), and for every subsequent offense and conviction thereof, shall be liable to a fine of twenty-five thousand dollars ($25,000): *Provided*, that in all cases under this act either party shall have the right of trial by jury.

"119. 'RAILROAD CORPORATION' DEFINED.] § 11. The term 'railroad corporation,' contained in this act, shall be deemed and taken to mean all corporations, companies or individuals now owning or operating, or which may hereafter own or operate any railroad, in whole or in part, in this State; and the provisions of this act shall apply to all persons, firms and companies, and to all associations of persons, whether incorporated or otherwise, that shall do business as common carriers upon any of the lines of railways in this State (street railways excepted), the same as to railroad corporations hereinbefore mentioned."

The first count of the declaration alleged that the defendant (plaintiff in error) was a railroad corporation organized under the laws of the State of Illinois, and was operating a railroad lying partly within the State of Illinois, and running from Peoria, Illinois, eastward through the County of Ford and through the stations of Gilman and Sheldon, in Iroquois County, Illinois, to Toledo, in the State of Ohio, commonly known as the Wabash, St. Louis & Pacific Railroad, and was then and there doing business as a common carrier of freight and passengers upon and over said railroad.

That said defendant carried from Peoria through Gilman, in the State of Illinois, to New York City, in the State of New York, upon and over said railroad and railroads, connected therewith, for Elder & McKinney, of Peoria, Illinois, one car load of corn weighing 26,000 pounds, and charged and collected therefor the sum of thirty-nine dollars; and at the same time, upon the same railroads, defendant carried from Gilman, Illinois, to New York,

for Bailey & Swannell, residents of said State of Illinois, one car load of oil cake weighing 26,000 pounds, being of the same class of freight as the car load of corn aforesaid, and charged and collected as freight therefor the sum of sixty-five dollars. That the distance from Peoria to Sheldon, a station on said railroad at the eastern boundary of the State of Illinois, is 109 miles, and from Gilman to Sheldon is 23 miles, and that the distance from Gilman to New York, over said route, is less than the distance from Peoria to New York by 86 miles, and that the rate of freight charged and collected on the one car load of corn from Peoria to New York was fifteen cents per 100 pounds, while the rate charged and collected on the one car load of oil cake, carried from Gilman—86 miles less distance—was twenty-five cents per 100 pounds, and that the same proportionate discrimination was made for the distance the freight was carried in Illinois, that was made for the entire distance.

The second count alleges the carrying of a certain other car load of corn from Peoria to New York, and a certain other car load of oil cake from Gilman to New York, with other allegations, substantially the same as those in the first count, and charges that the car load of corn was carried 109 miles in Illinois upon defendant's line of railroad, and said car load of oil cake was carried only 23 miles, and that the tolls and compensation charged and collected by the defendant railway corporation for the transportation of the car load of oil cake from Gilman to New York exceeded the tolls and compensation charged and collected for the transportation of the said car load of corn from Peoria to New York by the sum of ten cents per 100 pounds, making a total excess on the car load of $26.

The third count sets forth the same facts as in the first count, as to other car loads of corn and oil cake, and avers that the defendant charged and collected fifteen cents per 100 pounds for carrying the car load of corn, making $39, and twenty-five cents per 100 pounds for carrying the car load of oil cake, making $65. And that the rate charged on the oil cake exceeded that charged for carrying the corn by ten cents per 100 pounds, making an excess of $26.

The fourth court alleges substantially the same as the third, as to still other car loads, and avers that the car load of corn was carried 86 miles further in the State of Illinois upon and over defendant's railway than the car load of oil cake.

A *nolle prosequi* was entered as to the fifth count in the declaration.

Defendant, by its counsel, demurred to the declaration, and each count thereof, which demurrer, in pursuance of the mandate of the Supreme Court of the State of Illinois in respect thereto, was overruled. Thereupon defendant filed its plea of *nil debet*, upon which, plaintiff joined issue, and a special plea setting forth that the rates of toll or compensation specified in plaintiff's declaration were so charged and collected for services rendered under entire agreements and undertakings to transport freight from Gilman, in the State of Illinois, to New York City, in the State of New York; and that in such undertakings and agreements the portions of such services rendered, or to be rendered, within the State of Illinois, were not apportioned or separated from said entire services.

And the defendant avers that said action is founded solely upon the supposed authority of a certain act of the General

Assembly of the State, approved May 2d, 1871–[1873], entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and to prescribe a mode of procedure and rules of evidence thereto, and to repeal an act entitled an act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in the State for transportation of freight on said roads, approved April 7th, 1871."

And the defendant further avers that said services have been rendered, as aforesaid, under entire agreements and undertakings to transport said freight from within the State of Illinois to the State of New York aforesaid, and the said act of the General Assembly aforesaid does not affect or control or relate to the same, but on the contrary, such transportation being among the States, falls within the operation of, and is wholly controlled by the terms of the third clause of section eight of article one of the Constitution of the United States, and the defendant sets up and relies upon said clause of the Constitution of the United States as a complete defense and protection in said action; all of which defendant is ready to verify; wherefore it prays judgment.

Plaintiff demurred to this special plea, and the Court sustained the demurrer.

The parties to the suit stipulated that "For the purpose of the trial of said cause, and to save the taking of evidence, and the making of proof therein, it is hereby agreed on the part of the defendant, that the allegations and averments in the first count of said declaration are true, except that part of the said count which avers that the same proportional discrimination was made in the transportation of said property—oil cake and corn—in the

State of Illinois that was made between Peoria and New York City and Gilman and New York City, which averment is not admitted, because the defendant claims that is an inference from the fact that the rate charged in each case of said transportation of oil cake and corn were through rates, but it is admitted that the said averment is a proper one."

This stipulation was signed by both parties, and was all the evidence offered upon trial.

Counsel for defendant below submitted and asked the Court to hold as law the following propositions:

1. The Court holds as law that as the tolls or rates of compensation charged and collected by the defendant in the instance in question were for transportation service rendered in transporting freight from a point in the State of Illinois to a point in the State of New York under an entire contract or undertaking to transport such freight the whole distance between such points, that the act of the General Assembly of the State of Illinois, approved May 2d, 1873, entitled "An act to prevent extortion and unjust discrimination in rates charged for the transportation of passengers and freight on railroads in this State, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discrimination and extortion in the rates to be charged by the different railroads in this State for the transportation of freight on said roads, approved April 7th, 1871,' " does not apply to or control such tolls and charges, nor can the defendant be held liable in this action for the penalties prescribed by said act.

2. The Court further holds as law that said act in relation to extortion and unjust discrimination cannot apply to transportation service rendered partly without this State, and consisting

of the transportation of freight from within the State of Illinois to the State of New York, and that said act cannot operate beyond the limits of the State of Illinois.

3. The Court further holds as matter of law, that the transportation in question falls within the proper description of "Commerce among the States," and as such can only be regulated by the Congress of the United States under the terms of the third clause of section eight of article one of the Constitution of the United States.

4. That the penalties sued for in this action could only be imposed under proper statutory authority, and such authority not being found, the law is for the defendant.

But the Court refused to hold as law either of said propositions, and marked each of them "Refused," and rendered judgment against the defendant for $1,000.

Defendant excepted and moved the Court to set aside the judgment and grant a new trial.

No written motion or causes for new trial were filed.

The Court overruled the motion.

Defendant appealed to the Supreme Court of the State of Illinois, where the judgment of the Ford County Circuit Court was affirmed, and it now brings the case to this Court to reverse the judgment of the Supreme Court of Illinois.

ARGUMENT.

We agree with statement of counsel for plaintiff in error that the issue in this case is clear and sharp, there being no dispute as to the facts.

The plaintiff in error did charge a higher rate for transporting a like quantity of freight, of the same class, in the same direction, at the same time, for a shorter distance than for a longer one. This the law prohibits.

The Legislature of the State of Illinois had full power to enact the above recited law, and the Courts of the State full power to to enforce it.

I.

Unjust discrimination was forbidden at common law, and may be made punishable by statute.

A railroad company is an agent of the public in consequence of the powers conferred upon it.

Messenger et al. v. *Penn. R. R. Co.*, 36 N. J. 407.

"A common carrier engages in a public employment, takes upon himself a public duty and exercises a sort of public office."

McDuffee v. *R. R Co.*, 52 N. H. 430, citing:

Sandford v. *R. Co.*, 24 Pa. St. 378, 382.

N. J. S. N. Co. v. *Merchants' Bank*, 6 How. 344–382.

Sheldon v. *Robinson*, 7 N. H. 157, 163, 164.

Gray v. *Jackson*, 51 N. H. 9, 10.

Ansell v. *Waterhouse*, 2 Chitty, 1, 4.

Hollister v. *Nowlen*, 19 Wend. 234, 239.

Being engaged in a public employment, the carrier can not discriminate against the public or any persons in it, but must render to all persons under like circumstances the same service indiscriminately.

A common carrier cannot exercise an unreasonable discrimination in carrying for one and refusing to carry for another.

McDuffee v. *R. R. Co.*, *supra.*

Bennett v. *Dutton*, 10 N. H. 481.

A railroad company may not refuse to one person the same privileges and rates of transportation which it furnishes to another.

New Eng. Ex. Co. v. *Me. Cen. R. R. Co.*, 57 Me. 188.
Munn v. *Illinois*, 95 U. S. 113.

The hire charge must be no more than a reasonable renumeration to the carrier, and consequently not more to one than to another for the same service.

Pickford v. *Grand Junction R'y Co.*, 10 M. & W. 399.
Parker v. *Gr. W. R'y Co.*, 8 Eng. L. & Eq. 426.
Messenger et al. v. *Penn. R. R. Co.*, *supra*.

Whenever any person or corporation sustains such relations to the public, that the people must of necessity deal with him, and are under a moral duress to submit to his terms, if they are unrestrained by law, then, in order to prevent an abuse of his position, the price he may charge for services may be regulated by law.

Com. v. *Duane*, 98 Mass. 1.
State v. *Perry*, 5 Jones' L (N. C.) 252.
State v. *Nixon*, Ibid. 258.
Murray's Lessee v. *Hoboken L. & Imp. Co.*, 18 How. 272.
Kirkham v. *Shawcrass*, 6 T. R. 17.
Ogden v. *Saunders*, 12 Wheat. 259.

In the case of *Munn* v. *Illinois*, this honorable court cited with approval the case of *Aldnutt* v. *Inglis*, 12 East. 527, and quoted from Lord Ellenborough that "There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if, for a particular purpose, the public have a right to resort to his premises, and make use of them, and he have a monopoly

in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

And the Court say: "From the same source comes the power to regulate the charges of common carriers."

Also: "Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co.* v. *Merchants' Bank*, 6 How. 382. Their business is therefore affected with a public interest." * * * "When private property is devoted to a public use, it is subject to public regulation."

Railroads are devoted to public use. The owners have assumed public duties and responsibilities, and they are subject to regulation by the public.

An act requiring charges to be *equal* is valid.

Angell on Carriers, § 128.

Sanford v. *R. R. Co.*, 24 Pa. St. 378.

It follows, then, that a regulation of charges, so that the same services shall be rendered for persons under like circumstances upon the same terms, is a proper legislative function, and a law having the prevention of unjust discrimination for its object, if properly enacted by the proper legislative body, may be enforced.

Now, if this was forbidden at common law, does it become less so when made an offense by statute, which, according to many cases, is but declaratory of the common law?

Can it be said that an offense at common law may be punished without statutory aid, but when the same act is by statute declared to be an offense, and a penalty is prescribed by statute,

with the means of enforcing it, both the common law and statutory remedy are gone; and that if there were no statute, the penalty could be imposed; but there being a statute defining the same offense and declaring the penalty, that statute shall be declared unconstitutional and no penalty shall be recovered?

Such a conclusion is absurd, and so is all reasoning that leads to that result.

It should be borne in mind, too, that this offense does not consist in the transportation of the goods, nor in the commerce, but consists in the discrimination made in the rates charged for the service rendered or to be rendered.

II.

Is this power affected by the 3d clause of Sec. 8, Art. I. of the Constitution?

To defeat the recovery which the laws would otherwise authorize, it is urged for plaintiff in error that the judgment recovered in the courts of the State of Illinois ought to be reversed because the law under which the penalty was imposed, when applied to a discrimination in the rates charged for the transportation of freight from a point within the State of Illinois to a point within another State, is a regulation of inter-State commerce and is in violation of the 3d clause of section 8 art. I. of the Constitution of the United States.

That clause is: The Congress shall have power "(Third) to regulate commerce with foreign nations and among the several States and with the Indian tribes."

The line of argument of plaintiff in error is that the transportation was inter-State commerce; that the law in question concerning the rate of transportation is an attempt to regulate such commerce by the State and is consequently void.

It may be conceded that transportation from one State to another is "commerce among the States," but the conclusions deduced by counsel for plaintiff in error: that the Illinois law is a regulation of that commerce; or that the law is one beyond the power of the State to enact, by no means follow.

Is the act under which this suit is brought an act "to regulate commerce among the States" within the meaning of that phrase, as used in the Constitution of the United States?

Commerce includes traffic in and exchange of commodities between different communities and the conveying or transportation of such goods from one place to another.

At the time of the adoption of the constitution it was usual for countries or nations to enact laws or prescribe rules and regulations, only in accordance with which merchandise could be transported out of or into the country. Such rules might extend to an entire inhibition of importation or exportation of certain classes of goods, or might only impose a burden or tax upon the person or property, which tax or duty inured to the benefit of the government imposing it and became a part of its revenue, and thereby promoted the general welfare in the regulation of such commerce by fostering certain industries or discouraging others, and increased the revenues of the government by an equitable distribution of taxation. The undoubted intent of the Constitution was to confer on Congress this ordinary and usual power as it was then commonly understood, and Congress took no more by the Constitution than the *intended* power. Railroads were then unknown. Such a thing as discrimination in railroad rates for the transportation of freight was then unthought of.

The provision was intended to apply to such acts as had for their object, and such as applied directly to, the regulation of intercourse and traffic among the States, and such as tended "to regulate commerce" as the term was then understood and construed.

The act in question has for its object, neither directly nor indirectly, the promotion, restraint or regulation of commerce among the States. No hindrances, burdens, privileges or encouragements to commerce among the States are presented by the law, and no revenue, or advantage or disadvantage, to this or another State, is sought to be effected by the law.

A State law imposing a tax or license upon the sale of goods manufactured in another State, and thus discriminating in favor of home manufactures, is invalid.

"She (the State) may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this *discriminating kind* that the framers of the Constitution intended to guard, when they vested in Congress the power to regulate commerce among the several States."

Webber v. *Virginia*, 103 U. S. 344.

Not everything which affects commerce is a regulation of it, within the meaning of the Constitution.

State Tax on R'y Gross Receipts, 15 Wall. 284.

Munn v. *Illinois*, 94 U. S. 113.

Gibbons v. *Ogden*, 9 Wheat. 1.

Passenger Cases, 7 How. 283.

Slaughter House Cases, 16 Wall. 36.

The law under consideration in *R. R. Co.* v. *Husen*, 95 U. S. 465, was a direct prohibition of the importation of cattle from a certain geographical territory into or across the State of Missouri. This was held to be in conflict with the clause in relation

to commerce, but the court in that case say that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; it may prevent persons and animals suffering under contagious disease, or convicts, from entering the State; it may establish quarantine and reasonable inspection laws. And such laws, when necessary for self-protection of the State, its property and citizens, would be sustained and enforced even though they might operate upon or affect commerce among the States.

Neither this case nor the case of *Hall* v. *DeCuir*, cited by counsel for plaintiff in error, contains anything adverse to the position of defendant in error.

We concede all the way through that "*transportation* is commere," but the act in question neither prohibits nor regulates the commerce or transportation.

An ordinance by city authorities for the convenience and safety of commerce is proper. Local authorities may prescribe at what wharf a vessel may lie, and how long she may remain there, when she may unload or take on board particular cargoes, where she may anchor in the harbor, and for what time, and what discription of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail, and all these regulations may apply to vessels engaged in foreign commerce and laden with goods to be transported from one of the United States to a foreign country. Such regulations are not in conflict with any law of Congress or the Constitution of the United States.

The James Gray v. *The John Fraser*, 21 How. 187.

And yet such regulations may affect inter-State commerce even more directly that the statute in question.

The imposition of wharfage fees by a city, upon packets using its wharves while engaged in commerce among the States, is not prohibited by the Constitution of the United States.

Packet Co. v. *St. Louis*, 100 U. S. 423.

Vicksburg v. *Tobin*, 100 U. S. 430.

Packet Co. v. *Keokuk*, 95 U. S. 80.

A law of the State of Pennsylvania requiring a vessel which neglects to take a pilot, to forfeit and pay half pilotage, is an appropriate enactment, and is not in conflict with the 3d clause, section 8, article 1, of the Constitution of the United States.

Cooley v. *Board of Wardens*, 12 How. 318.

Where a State law imposes a tonnage tax upon foreign vessels in such a manner as to constitute only a tax or duty on the vessel, it will not be sustained. But if the tonnage tax is merely a method of measuring the *compensation to be paid* for services or accommodations furnished, it will be upheld.

Inman Steamship Co. v. *Tinker*, 94 U. S. 238.

There is a distinction between a sovereign exaction and a charge for compensation.

A city may charge and collect wharfage fees from vessels engaged in navigation and commerce among the States, which fees may be based and computed upon the tonnage of the vessel, but when such fees are compensation for the use of the wharf, the regulation is not in conflict with the constitutional provision or act of Congress prohibiting the State from imposing a tonnage tax.

Packet Co. v. *Keokuk*, 95 U. S. 80.

Transportation Co. v. *Parkersburg*, 107 U. S. 691.

Wharfage based upon tonnage has nothing to do with a tonnage tax. The one is imposed by the owner of the wharf as compensation for its use; the other is imposed by the government as a tax, having reference solely to its commerce or revenues. * * * Wharfage must be reasonable, but the question whether or not the charges are extortionate must be settled "by the local municipal law, *at least until some superior or paramount law has been prescribed.*"

"If the rates of wharfage exacted are deemed extortionate or unreasonable, the Courts of the United States, (in cases within their ordinary jurisdiction), as well as the Courts of the States, must apply and administer the *State laws* relating to the subject; and *these laws will probably, in most cases, be found to be sufficient for the suppression of any glaring evils.*"

Transportation Co. v. *Parkersburg*, 107 U. S. 691.

Thus the clear right of the State to regulate wharfage charges is recognized.

Wharves are common and necessary aids to commerce, and if a State law limiting and regulating the fees to be charged for the use of such wharf, though the use may be in aid of commerce among the States, is not a regulation of commerce, a law of the State requiring charges for the transportation of freight to be uniform or not to be extortionate, would certainly not be a regulation of commerce.

These cases establish fully that many enactments by the States, which directly *affect* commerce, are not regulations of it.

The law in question is not directed toward a regulation of commerce.

The law is discussed by counsel for plaintiff in error as if the *transportation* of the freight was the objective point legislated upon.

I beg leave to call the attention of the Court to the fact that this law nowhere attempts to compel the railroad company to carry or not to carry freight of any kind, at any time, in any manner, or to or from any place.

The subject matter here legislated upon is the *discrimination in the rates charged* for the carriage. The railroad company may refuse to carry any freight (so far as the law in question is concerned), or may carry any goods it pleases from this State to another or from another State to this State, at any time and in any manner. The law does not interfere with such commerce; but the railroad company being a public servant, a common carrier, this law says it shall not injure one citizen of Illinois by charging him a greater rate than is charged another citizen for the same service. It says to the company, carry when and how and where you please, but treat every citizen of Illinois alike. Give one the same rate you do another for like service. You may contract to carry goods and to receive compensation therefor. If you contract to carry for one and charge and collect from him a greater rate for such carriage than you do from another for like carriage, you shall pay a penalty of $1,000. The *charging* and *collecting* the exorbitant rates constitute the violation of the law.

It is admitted that the transportation is commerce. But *transportation* is not, indeed, necessary to establish an offense under this law. If two persons, at the same time and place in Illinois, deliver freight of the same kind and quantity to be transported to New York City by the same company over the same line or lines of railway at the same time, and the railroad company then and

there charges and collects from one a reasonable rate for such carriage and collects from the other a sum greatly in excess of the rate charged the first, the offense is then complete, though the goods have not passed beyond the limits of the State of Illinois, or have not been started by the railroad company toward their destination.

The law only says that the railroad company shall not make a certain kind of contract. The penalty is imposed for making the contract, (express or implied). The road is free to carry the freight, but the State says the same rates shall be given to one that are given to another.

How can this be said to be a regulation of commerce. The acceptance of a rate for carriage is held to be evidence that that rate is a reasonable rate. All higher rates for like services are held to be unreasonable, discriminating and unlawful. The law, then, is not in any manner in restraint of trade.

It is not every law that *affects* inter-State commerce that is a regulation of it.

The right of the States to enact usury laws is conceded and sustained, and such laws are held valid and their provisions enforced, even though the contract containing the usurious agreement was made between citizens of different States and pertained to matters of inter-State commerce.

The law is to regulate the charging, collecting and contracting. So in the case at bar.

Laws imposing a tax upon property located in the State, though used exclusively in inter-State commerce, are sustained, and yet they *affect* inter-State commerce.

Laws permitting or authorizing one person to sue another may affect inter-State commerce, but they do not regulate it.

The exemption laws of the various States are often an element of material consideration in inter-State commerce, but they are not regulations of commerce.

Many other examples might be cited but these illustrate fully the point that the fact that inter-State commerce may be affected by a law, does not render that law a *regulation* of commerce among the States, and unconstitutional.

Because a law may affect commerce, it will not do to jump to the conclusion that it is a regulation of it, and we here contend that the law under consideration is no regulation of commerce.

This neither regulates the transportation nor commerce between the States.

This law is not in conflict with any act of Congress and is within the power of the State to enforce.

It may be suggested here, that the Constitution does not undertake to regulate commerce among the States. It only confers upon the Congress *power* to regulate such commerce.

There are certain powers that may be exercised:

1. By Congresss exclusively.

2. By the States exclusively.

3. By Congress and the States concurrently.

4. By the States until Cougress shall act, at which time the acts of Congress shall be paramount.

Congress has passed no law upon the subject in dispute, and the law under consideration is not in conflict with any *law of Congress.*

The authority to regulate commerce belongs to the fourth division named above.

See *Fuller* v. *R. R. Co.*, 17 Wall. 560.

Where the Congress is by the Constitution given the control of any specified subject, not *per se* national, and has wholly failed to exercise that power, and to assume the authority given to Congress, a State may legislate concerning the same subject matter, so far as the same pertains to that State or the person and property within its borders, and such legislation is valid and of full force, not being in contravention of any act of Congress, until Congress shall legislate upon that subject.

See *Wilson* v. *Blackbird Creek Marsh Company*, 2 Peters, 250.

Gilman v. *Philadelphia*, 3 Wall. 728.

Wheeling Bridge Case, 18 How. 430.

The James Gray v. *The John Fraser*, 21 How. 184.

The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter.

Cooley v. *Board of Wardens*, 12 How. 318.

If this statute is in any sense a regulation of inter-State commerce, it belongs to that class of powers which may be exercised by the State in the absence of controlling congressional legislation.

Moore v. *Houston*, 5 Wheat. 1.

Sturgis v. *Crowninshield*, 4 Id. 193.

Wilson v. *Blackbird Creek Co.*, 2 Pet. 251.

License Cases, 5 How. 134.

Cooley v. *Board of Wardens*, 12 How. 299.

Gilman v. *Philadelphia*, 3 Wall. 713.

The Court, through Mr. Justice Field, in rendering the opinion in *Gloucester Ferry Co.* v. *Penn.*, referred to by counsel for R. R. Co., said:

"Still the fact remains that such a ferry is a means, and a necessary means, of commercial intercourse between the States bordering on their dividing waters, and it must therefore be conducted without the imposition by the States of taxes, or other burdens, upon the commerce between them. Freedom from such imposition does not, of course, imply exemption from reasonable charges, as compensation for the carriage of persons, in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. *Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the States secured under the commercial power of Congress.*

Packet Co. v. *Keokuk*, 95 U. S. 80.
Packet Co. v. *St. Louis*, 100 U. S. 423.
Vicksburg v. *Tobin*, 100 U. S. 430.
Packet Co. v. *Catlettsburg*, 105 U. S. 559.
Transportation Co. v. *Parkersburg*, 107 U. S. 691.

"*That freedom implies exemption from charges other than such as are imposed by way of compensation for the use of the property employed, or for facilities afforded for its use, or as ordinary taxes upon the value of the property.*"

It is thus evident that it is not every class of State legislation that affects inter-State commerce, that is an infringement upon the rights of Congress to *regulate* such commerce. A person or corporation residing in Illinois, and engaged wholly in inter-State commerce, and having property located in Illinois, would be liable to taxation in Illinois upon such property. This would *affect* the business of the owner. In order to afford a profit the receipts must be larger by the amount of the tax than would otherwise be necessary. But that is by no means a regulation of commerce. In the case at bar, there is no burden imposed upon the property or the business; no restriction is placed upon the carriage; no attempt is made to *regulate* the carriage, and there is

no *regulation* of commerce by the act, however much it may affect it. It is not an act to prevent commerce among the States, nor to produce any benefit of any kind to the State because of such commerce. It is purely and solely an act to protect the citizens of the State, or persons contracting within the State, from injury or oppression by a railroad corporation performing an unlawful act,—an act in violation of the common law, and for which the injured person might, under the common law, and without the aid of the statute, recover the amount of his damage.

This act protects persons in Illinois in the use and enjoyment of their property. It regulates charges for service and not the transportation. It declares that the R. R. Co. shall not build up the fortunes of a favored individual and destroy those of one not so favored by an abuse of the franchise granted by the State to the R. R. Co. to receive and collect tolls. It owes a public duty to all persons requesting it, to carry their freight for a reasonable compensation. The law simply regulates this charge to the extent of saying the R. R. Co. must deal with all citizens fairly and alike in the discharge of its public duties. Instead of leaving the citizen to his personal remedy at common law, of simply recovering the amount of the discriminating charge, the statute undertakes to correct and prevent that abuse of power, and it is declared to be a wrong against the State as well, which wrong is made punishable and sought to be remedied and prevented by the imposition of a penalty under the statute.

The case of *R. R. Co.* v. *Fuller*, 17 Wall. 560, is not unlike the case at bar. In that case a statute of Iowa, passed in 1862, enacted as follows:

"In the month of September, annually, each railroad company shall fix its rates of fare for passengers and freights, for transportation of timber, wood and coal per ton, cord or thousand

feet per mile; also its fare and freight per mile for transporting merchandise and articles of the first, second, third and fourth grades of freight.

And on the 1st day of October, following, shall put up at all the stations and depots on its road, a printed copy of such fare and freight, and cause a copy to remain posted during the year.

For willfully neglecting so to do, or for receiving higher rates of fares or freight than those posted, the company shall forfeit not less than $100, nor more than $200, to any person injured thereby and suing therefor."

An act of Congress of June 15, 1866, authorized every railroad company in the United States, whose road is operated by steam, "to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to *receive compensation therefor*, &c."

The Chicago & N. W. Ry. Co., chartered in Illinois and having its principal office in Chicago in that State, operated a line of railway from Chicago through Illinois, Iowa and other States, and through the city of Marshalltown in the State of Iowa. Said railway company posted its rates at its station in Marshalltown as required by the Iowa law. It carried freight from Chicago, Illinois, to Marshalltown, Iowa, for Mr. Fuller and charged and received from him a higher rate of freight than the schedule rate. Suit was brought to recover the penalty imposed by the Iowa law.

It was urged in defense that the Iowa law was in conflict with the clause of the Constitution of the United States relating to commerce among the States, and in conflict with the above cited act of Congress.

The Court, through Mr. Justice Swayne, said:

"No discrimination is made between local and inter-State freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed,

made public and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was doubtless deemed to be called for by the interests of the community to be affected by it, *and it rests upon a solid foundation of reason and justice.*"

It is difficult to perceive any difference in principle between that case and the one at bar.

In the one case the law requires that the railroad company shall not charge a shipper more than it charges another like shipper.

In the other it required that the railroad company should not charge a shipper more than a posted rate.

In one case the shipper might learn his maximum rate by inquiry as to the rate paid by another shipper of like freight.

In the other case he might learn his maximum rate by an examination of the schedule posted in the freight depot.

A charge in excess of either is by the respective laws made an offense.

And in speaking of the Iowa law the Court said further:

"It is not, in the sense of the Constitution, in any wise a regulation of commerce. *It is a police regulation,* and as such forms 'a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all which can be most advantageously exercised by the States themselves.'"

In conclusion the Court say:

"If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce,* the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But as we are unanimously of the opinion that they are merely police regulations, it is unnecessary to pursue the subject."

In concluding this branch of the argument, we submit that this case is controlled by the decisions of this Court in the case of *Peik* v. *Chicago & N. W. R'y Co.*, 94 U. S. 164; *C. B. & Q. R. R. Co.* v. *Iowa*, Ibid. 155, and *Munn* v. *Illinois*, Ibid. 113.

In the first of said cases, the Chief Justice, in delivering the opinion of the Court, said:

"The suits present the single question of the power of the Legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago & N. W. R'y Co. for fare and freight upon the transportation of persons and property carried within the State, or taken up outside the State and brought within it, or taken up inside and carried without. As to the effect of the statute as a regulation of inter-State commerce, the law is confined to State commerce, or such inter-State commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to inter-State commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the State. But, certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without."

The facts in the Peik case and the case at bar are alike in all essential particulars. The law of Wisconsin fixed the maximum rate to be charged by the railway company for the transportation of freight from points within the State of Wisconsin to points outside the State.

The Peik case was brought to test the validity of that law, and this Court sustained the law.

In the case at bar, the Illinois law authorizes the same thing, and further undertakes to prevent the railway company from discriminating in the rates charged. So far as the present case is concerned, the validity of the law is in issue only so far as pertains to that portion of it which forbids unjust discrimination.

This is not an attempt to enforce the Illinois law to the extent of establishing rates for the carriage of freight from any point within the State to any point without the State. This feature of the law is not in issue. The railroad company was free to fix its rates, subject only to the provision that they should be uniform for like service. And although required to be uniform, the Illinois law does not require that they shall be the *same* under all circumstances. For valid reasons the railroad company may charge one person more than another, or may charge a higher rate from one point than from another for an equal or greater distance.

In the case of the *C. B. & Q.* v. *Iowa*, 94 U. S. 155, the Court say, the regulation of freight rates is a matter of domestic concern. The railroad is employed in State as well as in inter-State commerce, and until Congress acts the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though, in so doing those without may be indirectly affected.

We insist, that these cases are decisive of the issue in this case so far as inter-State commerce is involved.

When this case was first tried, in the Supreme Court of Illinois, the above named cases in 94th U. S. were thoroughly considered and the rule of law there laid down was followed by the State Supreme Court.

The People of the State of Illinois v. *Wabash, St. Louis & Pacific Railway Co.*, 104 Ill. 476.

Counsel for plaintiff in error undertakes to account for the decision in the Peik case and in the C. B. & Q. case by saying, that they were chancery cases to enjoin the execution of a law, and that that form of action could not be sustained.

The record does not show but that the Statutes of Iowa and Wisconsin, specially authorized that form of action under the circumstances in those cases.

However, that may be, the cases were argued, tried and decided on their merits. The opinion of the Court was upon the merits of the cases. That opinion would not be changed by the possible fact that some particular case did not require its expression.

It may be conceded that a State law requiring railway companies to give equal accommodations on cars going from State to State to all passengers, would fall under the condemnation of the decision in *Hall* v. *DeCuir*, and it would not follow that State regulation of compensation for service must be denied, for there is a wide difference between the exercise of the right to live and act and those collateral matters which do not relate to the very existence of a being, but to its mere convenience.

Stone v. *Y. & M. V. R. R. Co.*, 62 Miss. 607.

The case of *Hall* v. *DeCuir*, 95 U. S. 485, is cited by counsel for plaintiff in error, and is also relied on as authority by the courts of Kansas in *Hardy* v. *A. T. & S. F. R. R. Co.*, 18 Am. and Eng. Railroad Cases, 432, and the court of Mississippi in *Stone* v. *I. C. R. R. Co.*, Id. 416, as sustaining the view that any attempt to fix or regulate the tariff of charges of a railroad company, operating a line in two or more States, is an attempt to regulate inter-State commerce. This, we believe, is a misapprehension, as an examination of the DeCuir case will show.

The record in that case shows that the contention there did not arise over an attempt to regulate the contract rate of charges for passenger fare, but over an attempt by the State to regulate the manner in which the steamboat engaged in inter-State commerce, should transact and conduct its business. The boat was engaged in business on a National highway, the navigable waters of the United States, and was licensed to carry on such business in pursuance of an act of Congress. Her right to engage in and carry on inter-State commerce was derived originally from Congress, and could not be interfered with or regulated by State authority.

III.

The law is a police regulation.

But there is another view of this case to which we ask the careful attention of the Court. The Statute of the State of Illinois in question, forbids a railroad company doing business in said State, to contract for, collect and receive a greater rate of fare for like service, for a shorter distance than for a longer one; in other words, forbids the making and enforcing a contract which unjustly discriminates against one citizen or locality and in favor of another, and provides that any railroad company making and enforcing such contract shall suffer a forfeiture.

It is purely an attempt on the part of the State to say what kind of a contract a corporation doing business in said State may make and enforce, and what contracts such bodies may not enforce. We contend that in the exercise of its police power, the State has full right to make and enforce such a statute, and that in the exercise of this power it in no way attempts to regulate commerce among the States or interfere with the authority conferred upon Congress in regard thereto. The State in no way

attempts to tax hinder, delay, restrict, control or regulate inter-State commerce, but simply says in its law, that a discriminating contract is illegal, and provides the penalty for such illegal act.

This law lays no tax on merchandise coming into or going out of the State, nor does it operate to discriminate against any articles of commerce, or against any class of persons, residents or non-residents of the State; and though its operation may incidentally affect inter-State commerce, that fact, according to the decision of this Court, does not make it unconstitutional as regulating inter-State commerce, for it does not regulate it in the constitutional sense or the ordinary signification of that term.

"Many acts of a State may affect commerce, without amounting to regulation of it in the constitutional sense of the term." *R. R. Co.* v. *Hasen, supra.*

Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196.

The Illinois law is not a regulation of or restriction upon the *transportation* of the commodities, but a regulation or restriction of the burdens which a railway company might otherwise place upon one citizen of the Strte of Illinois over those placed upon another under like conditions.

It protects persons within the State, and declares that each shall have the same privilege as every other person in like relations.

By the law the railroad company is permitted to establish its railroad in the State of Illinois as a public highway to be operated by itself, and is permitted to charge and collect tolls for the use thereof. But it is prohibited from operating such railroad to the injury of any person, by charging him a greater rate than is charged another for like service or transportation.

The offense made punishable by the Illinois law is *unjust discrimination*. The offense is making the unlawful contract and the unlawful charge. It is not the carriage of the goods. That this may in some degree affect commerce does not make it a regulation of commerce nor an infringement upon the constitutional provision in question.

If the law is not within the intended inhibition it is not inhibited at all and is of full force.

The entire scope, object and purpose of the act is to protect persons in Illinois in the equal enjoyment of their property, and to protect them against the greed and power of monopolies. Each State is charged with the care and protection of its own citizens against wrong and oppression, and in the use and enjoyment of uniform privileges.

Laws of a State intended to promote the general welfare of its citizens by protecting them in their persons, their property, their health, reputation or morals, are police regulations.

The laws of a State requiring a bell to be rung or whistle to be sounded when a train approaches a public highway; prohibiting trains from standing across a public street beyond a specified time; requiring a specified number of men to manage a train; requiring a railroad company to fence its track; prohibiting trains from running faster than a specified rate of speed in incorporated towns; requiring all trains to stop before crossing another railroad, and many other requirements, are police regulations, and may, in some degree, *affect* commerce among the States, but there can be no pretense that such laws are attempts to *regulate* commerce among the States, or are in contravention of any act of Congress or the constitutional provision referred to.

They are not less so than the law in question, which merely protects persons contracting with railroad companies doing business in Illinois, and guarantees to them equal rights and privileges in such contracts for the carriage of freight and passengers.

As before contended, there is a plain and manifest distinction between commerce, transportation, traffic, and a contract for services in relation thereto; between the transportation of articles of commerce, and the promise to pay for the services of the agents and instrumentalities of commerce. It is not an attempt in this case to regulate commerce, but to declare what shall be a valid contract in relation thereto. It is a well settled rule of law, that the law of the place where a contract is made determines the validity and force of such contract, and the fact that the consideration for the contract moves in another State, or that it is to be performed or consummated in another place, will not make the original contract better or worse.

We maintain that a contract is a proper subject matter for the supervision of the police power of the State, and that this power has been exercised over this subject throughout our entire history.

The exercise by statute of this control over contracts in regard to transportation certainly is not a discrimination against the commerce of another State so as to make the law obnoxious to the spirit of the constitutional provision.

In *City of New York* v. *Miln*, 11 Pet. 137, the Court say:

"We plant ourselves on what we consider impregnable positions. A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits, when the jurisdiction is not surrendered or restrained by the Constitution of the United States.

"That by virtue of this, it is not only the right, but the bounden and solemn duty of the State to advance the safety, happiness and prosperity of its people, and to provide for their general

welfare, by any and every act of legislation which it may deem conducive to these ends, when the power over the particular subject, or the manner of its exercise is not surrendered or restrained in the manner just stated.

"That all those powers which relate to mere municipal legislation, or what may perhaps more properly be called *internal police powers*, are not thus surrendered or restrained; and consequently, in relation to these, the authority of a State is complete, unqualified and exclusive. If we were to attempt a definition of this *internal police*, we should say, every law came within this description, which concerns the welfare of the whole people of the State, or of any individual within it, whether it related to their rights or their duties, whether it respected them as men or as citizens of the State, whether in their public or private relations, whether it related to the rights of persons or of property, of the whole people of the State or of the individual within it; and whose operation was within the territorial limits, and upon persons and things within its jurisdiction."

It cannot be denied that in the exercise of its police power, within the foregoing definition, the State may say what contracts are legal and what shall be forbidden, either as between persons, or persons and corporations. Under this power the State may say what contracts are promotive of the general welfare and what are contrary to public policy; what is a good consideration for a promise, and what is a void or illegal consideration; what is an usurious contract, and the measure of the forfeiture or penalty attached thereto.

In the exercise of this power certain kinds of business are forbidden or restrained, Sunday laws are upheld, common carriers are controlled, gambling contracts are prohibited, and in many instances public and private rights are subordinated to the legislative determination of what is for the common good.

West Virginia v. *B. & O. R. R. Co.*, 24 W. Va. 783.

Can it be doubted that, in the rightful exercise of this power, the State of Illinois may say that no corporation organized under the laws of said State, and transacting the business of a common

carrier by its sovereign permission, shall make a contract which discriminates in favor of one of the citizens of said State, and against another of said citizens, and that for the making and enforcing of such contract, such corporation shall suffer a penalty, to be recovered in proper action? Can it be contended that such a regulation is void, because it remotely relates to, or in some measure affects inter-State commerce?

But if it be held that the law is a regulation of commerce so far as it affects contracts made in Illinois, for the carriage of passengers or freight outside of the State of Illinois, still the present judgment must be sustained.

The Supreme Court of Illinois have construed the words "in this State" as used in the Railroad and Warehouse law, to apply to any railroad operated in the State of Illinois.

See *People* v. *Wabash, St. Louis & Pacific R'y Co.*, 104 Ill. 485.

This construction, I apprehend will be followed by this Court.

The pleadings aver and the evidence shows, that this road was operated in Illinois, and that the same proportionate discrimination was made for the distance the freight was carried in Illinois, that was made for the whole distance.

There was then a discrimination in rates for carrying in Illinois over an Illinois railroad.

The fact that the railroad company in making the contract of discrimination in Illinois, also made a contract of discrimination outside of the State of Illinois, would not discharge it from liability for the discrimination in the State of Illinois.

The Telegraph Co. v. *Texas*, 105 U. S. 460, and *State Tax Cases* v. *Pennsylvania*, 15 Wall. 232, hold, that so far as the taxes levied on telegrams sent wholly within the State, or taxes levied on freight carried wholly within the State are concerned, the question of their legality, and of the power to enforce their collection is one wholly within the jurisdiction of the Courts of the State, although the law imposing such tax also attempts to impose a tax on messages or freight sent from points without to points within the State.

So in the case at bar. If the contract for the carriage in Illinois was discriminating and unlawful, the enforcement of the penalty for such discrimination would not be refused, because the law in its terms might apply to some act performed out of the State and beyond its jurisdiction; nor because the contract for carriage within the State was coupled with a contract for transportation outside the State. The discrimination in Illinois would be a matter wholly for the determination of the Illinois Courts.

We submit that the natural interpretation of the contracts of shipment in this case, even if treated as entire contracts for through shipment, is that the same amount is charged and paid per mile for the entire distance, and that the rate per mile in each case was the same for that part of the distance lying in Illinois as for that part lying without said State.

The statute cannot be evaded by the pretext that the contract is an entirety and therefore cannot be divided or the charges apportioned to ascertain where the extortion or unjust discrimination was made.

The company cannot be permitted to charge less for transportation from Peoria, in the central part of the State, over more

than one hundred miles of its road, to a place a few miles into the State of Indiana, than for twenty-three miles west of the Indiana line to the same point in that State and be protected in the palpable violation of the law, under the claim that the law is an attempt to regulate inter-State commerce.

Section 15, article 11, of the Constitution of the State of Illinois, is as follows:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

The law in question was enacted in obedience to this mandate of the Constitution. Its object was to correct existing abuses and to protect the public from their repetition, and from the evils of unjust discrimination and extortion by railroad companies.

The law was demanded by the highest considerations of public policy and the protection of private rights. It has received the sanction of the highest Court of the State. It is intended to protect the weak against the strong, and unless its provisions are a palpable violation of a higher law it should be sustained.

In *R. R. Co.* v. *Yazoo, supra,* the court said:

"The regulation of a public employement conducted in a State by natural persons, belongs to the State in whose jurisdiction they are. There can be no distinction between natural and artificial persons except this: Natural persons possess rights not conferred by the State, while corporations depend on the act of their creation for their rights and powers. They must exist and act as made by the authority which brings them into being. The State being the creator of a corporation must determine its attributes and functions, and it must, from the necessity of the case, act in obedience to the law of its being."

If the state may create corporations and prescribe their powers, and conditions of existence, surely it may say what kind of contracts such corporations may make, in relation to the purposes for which they were organized.

We maintain that the law of the State of Illinois involved in the case at bar is merely the rightful exercise of its prerogative in determining what kind of a contract a corporation created by said State and doing business therein, may make.

In case of *Weber* v. *Virginia*, this Court said: in speaking of non-action by Congress; "Its non-action in such cases, with respect to any particular commodity, or mode of transportation, is a declaration of its purpose that commerce in that commodity or by that means of transportation, shall be free."

Counsel for plaintiff in error quote this expression as a declaration against the validity of the law in question and in support of the theory that wherever inter-State commerce is involved, the State is powerless to protect the citizen in any matter relating thereto.

We submit that the expression of the Court above referred to will properly bear no such construction. That in the declaration that in certain cases commerce should be free, the Court did not decide that the State was powerless to control the contracts which the corporations created by the State might make, even though those contracts might relate to or affect, incidentally, inter-State commerce, nor that it was powerless to protect its citizens in these matters from corporate extortions.

In conclusion we urge, that the questions involved in this case are of great importance, vitally affecting the welfare of the people of the State of Illinois; that the judgment of the Supreme

Court of the State of Illinois as announced in this case and reported in 104 Ill. 476, and 105 Ill. 276, constitutes the chief protection which said people have against the abuses of extortion and unjust discrimination by common carriers in such cases; that this judgment lays no burden upon commerce, and that it should be affirmed.

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for Defendants in Error.